UNITED STATES REPORTS

VOLUME 501

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1990

JUNE 6 THROUGH OCTOBER 4, 1991

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.[1]
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

RICHARD L. THORNBURGH, ATTORNEY GENERAL.[2]
WILLIAM P. BARR, ACTING ATTORNEY GENERAL.[3]
KENNETH W. STARR, SOLICITOR GENERAL.
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
SHELLEY L. DOWLING, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] JUSTICE MARSHALL announced his retirement on June 27, 1991, effective October 1, 1991.

[2] Attorney General Thornburgh resigned effective August 16, 1991.

[3] Mr. Barr became Acting Attorney General effective August 16, 1991.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 9, 1990, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.*

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 9, 1990.

(For next previous allotment, and modifications, see 484 U. S., p. VII, and 497 U. S., p. IV.)

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*For order of October 1, 1991, assigning JUSTICE KENNEDY to the Second Circuit, see *post*, p. 1283.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1990

CONNECTICUT ET AL. *v.* DOEHR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 90–143. Argued January 7, 1991—Decided June 6, 1991

A Connecticut statute authorizes a judge to allow the prejudgment attachment of real estate without prior notice or hearing upon the plaintiff's verification that there is probable cause to sustain the validity of his or her claim. Petitioner DiGiovanni applied to the State Superior Court for such an attachment on respondent Doehr's home in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The application was supported by an affidavit in which DiGiovanni, in five one-sentence paragraphs, stated that the facts set forth in his previously submitted complaint were true; declared that the assault by Doehr resulted in particular injuries requiring expenditures for medical care; and stated his "opinion" that the foregoing facts were sufficient to establish probable cause. On the strength of these submissions, the judge found probable cause and ordered the attachment. Only after the sheriff attached the property did Doehr receive notice of the attachment, which informed him of his right to a postattachment hearing. Rather than pursue this option, he filed a suit in the Federal District Court, claiming that the statute violated the Due Process Clause of the Fourteenth Amendment. That court upheld the statute, but the Court of Appeals reversed, concluding that the statute violated due process because, *inter alia*, it permitted *ex parte* attachment absent a showing of extraordinary circumstances, see, *e. g.*, *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, and the nature of the issues at stake in this case increased the risk that attachment was wrongfully

granted, since the fact-specific event of a fist fight and the question of assault are complicated matters that do not easily lend themselves to documentary proof, see *id.*, at 609–610.

Held: The judgment is affirmed.

898 F. 2d 852, affirmed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. Determining what process must be afforded by a state statute enabling an individual to enlist the State's aid to deprive another of his or her property by means of a prejudgment attachment or similar procedure requires (1) consideration of the private interest that will be affected by the prejudgment measure; (2) an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and (3) principal attention to the interest of the party seeking the prejudgment remedy, with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 335. Pp. 9–11.

2. Application of the *Mathews* factors demonstrates that the Connecticut statute, as applied to this case, violates due process by authorizing prejudgment attachment without prior notice and a hearing. Pp. 11–18.

(a) The interests affected are significant for a property owner like Doehr, since attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. That these effects do not amount to a complete, physical, or permanent deprivation of real property is irrelevant, since even the temporary or partial impairments to property rights that such encumbrances entail are sufficient to merit due process protection. See, *e. g.*, *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 85. Pp. 11–12.

(b) Without preattachment notice and a hearing, the risk of erroneous deprivation that the State permits here is too great to satisfy due process under any of the interpretations of the statutory "probable cause" requirement offered by the parties. If the statute merely demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, the judge could authorize deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. Even if the

provision requires a finding of probable cause to believe that judgment will be rendered in the plaintiff's favor, the reviewing judge in a case like this could make no realistic assessment based on the plaintiff's one-sided, self-serving, and conclusory affidavit and complaint, particularly since the issue does not concern ordinarily uncomplicated matters like the existence of a debt or delinquent payments that lend themselves to documentary proof. See *Mitchell*, *supra*, at 609. Moreover, the safeguards that the State does afford—an "expeditious" postattachment notice and an adversary hearing, judicial review of an adverse decision, and a double damages action if the original suit is commenced without probable cause—do not adequately reduce the risk of erroneous deprivation under *Mitchell*, since none of the additional factors that diminished the need for a predeprivation hearing in that case—that the plaintiff had a vendor's lien to protect, that the likelihood of recovery involved uncomplicated, documentable matters, and that the plaintiff was required to post a bond—is present here. Although a later hearing might negate the presence of probable cause, this would not cure the temporary deprivation that an earlier hearing might have prevented. Pp. 12–15.

(c) The interests in favor of an *ex parte* attachment, particularly DiGiovanni's interests, are too minimal to justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery. Although DiGiovanni had no existing interest in Doehr's real estate when he sought the attachment, and his only interest was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action, there were no allegations that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the suit that would render his property unavailable to satisfy a judgment. Absent such allegations, there was no exigent circumstance permitting the postponement of notice or hearing until after the attachment was effected. Moreover, the State's substantive interest in protecting DiGiovanni's *de minimis* rights cannot be any more weighty than those rights themselves, and the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate postdeprivation hearing. P. 16.

3. Historical and contemporary practices support the foregoing analysis. Attachment measures in both England and this country have traditionally had several limitations that reduced the risk of erroneous deprivation, including requirements that the defendant had taken or threatened some action that would place satisfaction of the plaintiff's potential award in jeopardy, that the plaintiff be a creditor, as opposed to the victim of a tort, and that the plaintiff post a bond. Moreover, a survey of current state attachment provisions reveals that nearly every

State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place. Although the States for the most part no longer confine attachments to creditor claims, this development only increases the importance of the other limitations. Pp. 16–18.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and III, the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Parts IV and V, in which MARSHALL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, J., joined, *post*, p. 26. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 30.

Henry S. Cohn, Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Clarine Nardi Riddle*, Attorney General, *Arnold B. Feigin* and *Carolyn K. Querijero*, Assistant Attorneys General, and *Andrew M. Calamari*.

Joanne S. Faulkner argued the cause for respondent. With her on the brief were *Brian Wolfman* and *Alan B. Morrison*.*

JUSTICE WHITE delivered an opinion, Parts I, II, and III of which are the opinion of the Court.†

This case requires us to determine whether a state statute that authorizes prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond, satisfies the Due Process Clause of the Fourteenth Amendment. We hold that, as applied to this case, it does not.

**Allan B. Taylor, James J. Tancredi*, and *Kirk D. Tavtigian, Jr.*, filed a brief for the Connecticut Bankers Association et al. as *amici curiae* urging reversal.

†THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE KENNEDY, and JUSTICE SOUTER join Parts I, II, and III of this opinion, and JUSTICE SCALIA joins Parts I and III.

I

On March 15, 1988, petitioner John F. DiGiovanni submitted an application to the Connecticut Superior Court for an attachment in the amount of $75,000 on respondent Brian K. Doehr's home in Meriden, Connecticut. DiGiovanni took this step in conjunction with a civil action for assault and battery that he was seeking to institute against Doehr in the same court. The suit did not involve Doehr's real estate, nor did DiGiovanni have any pre-existing interest either in Doehr's home or any of his other property.

Connecticut law authorizes prejudgment attachment of real estate without affording prior notice or the opportunity for a prior hearing to the individual whose property is subject to the attachment. The State's prejudgment remedy statute provides, in relevant part:

> "The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52–278c and 52–278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claims and (1) that the prejudgment remedy requested is for an attachment of real property . . . ." Conn. Gen. Stat. § 52–278e (1991).[1]

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[1] The complete text of § 52–278e reads:

"Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order. Attachment of real property of municipal officers. (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52–278c and 52–278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of

The statute does not require the plaintiff to post a bond to insure the payment of damages that the defendant may suffer should the attachment prove wrongfully issued or the claim prove unsuccessful.

As required, DiGiovanni submitted an affidavit in support of his application. In five one-sentence paragraphs, DiGiovanni stated that the facts set forth in his previously submitted complaint were true; that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr"; that "[s]aid assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries"; and that "I have further expended sums of money

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or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

"(b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: YOU HAVE RIGHTS SPECIFIED IN THE CONNECTICUT GENERAL STATUTES, INCLUDING CHAPTER 903a, WHICH YOU MAY WISH TO EXERCISE CONCERNING THIS PREJUDGMENT REMEDY. THESE RIGHTS INCLUDE: (1) THE RIGHT TO A HEARING TO OBJECT TO THE PREJUDGMENT REMEDY FOR LACK OF PROBABLE CAUSE TO SUSTAIN THE CLAIM; (2) THE RIGHT TO A HEARING TO REQUEST THAT THE PREJUDGMENT REMEDY BE MODIFIED, VACATED OR DISMISSED OR THAT A BOND BE SUBSTITUTED; AND (3) THE RIGHT TO A HEARING AS TO ANY PORTION OF THE PROPERTY ATTACHED WHICH YOU CLAIM IS EXEMPT FROM EXECUTION.

"(c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no such probable cause, the prejudgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken."

for medical care and treatment." App. 24A. The affidavit concluded with the statement, "In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." *Ibid.*

On the strength of these submissions the Superior Court Judge, by an order dated March 17, found "probable cause to sustain the validity of the plaintiff's claim" and ordered the attachment on Doehr's home "to the value of $75,000." The sheriff attached the property four days later, on March 21. Only after this did Doehr receive notice of the attachment. He also had yet to be served with the complaint, which is ordinarily necessary for an action to commence in Connecticut. *Young* v. *Margiotta*, 136 Conn. 429, 433, 71 A. 2d 924, 926 (1950). As the statute further required, the attachment notice informed Doehr that he had the right to a hearing: (1) to claim that no probable cause existed to sustain the claim; (2) to request that the attachment be vacated, modified, or dismissed or that a bond be substituted; or (3) to claim that some portion of the property was exempt from execution. Conn. Gen. Stat. § 52–278e(b) (1991).

Rather than pursue these options, Doehr filed suit against DiGiovanni in Federal District Court, claiming that § 52–278e (a)(1) was unconstitutional under the Due Process Clause of the Fourteenth Amendment.[2] The District Court upheld the statute and granted summary judgment in favor of DiGiovanni. *Pinsky* v. *Duncan*, 716 F. Supp. 58 (Conn. 1989). On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed. *Pinsky* v. *Duncan*, 898 F. 2d 852 (1990).[3] Judge Pratt, who wrote the opinion

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[2] Three other plaintiffs joined Doehr, challenging § 52–278e(a)(1) out of separate instances of attachment by different defendants. These other plaintiffs and defendants did not participate in the Court of Appeals and are no longer parties in this case.

[3] The Court of Appeals invited Connecticut to intervene pursuant to 28 U. S. C. § 2403(b) after oral argument. The State elected to intervene in the appeal and has fully participated in the proceedings before this Court.

for the court, concluded that the Connecticut statute violated due process in permitting *ex parte* attachment absent a showing of extraordinary circumstances. "The rule to be derived from *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337 (1969), and its progeny, therefore, is not that post-attachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present." *Id.*, at 855. This conclusion was deemed to be consistent with our decision in *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), because the absence of a preattachment hearing was approved in that case based on the presence of extraordinary circumstances.

A further reason to invalidate the statute, the court ruled, was the highly factual nature of the issues in this case. In *Mitchell*, there were "uncomplicated matters that len[t] themselves to documentary proof" and "[t]he nature of the issues at stake minimize[d] the risk that the writ [would] be wrongfully issued by a judge." *Id.*, at 609–610. Similarly, in *Mathews* v. *Eldridge*, 424 U. S. 319, 343–344 (1976), where an evidentiary hearing was not required prior to the termination of disability benefits, the determination of disability was "sharply focused and easily documented." Judge Pratt observed that in contrast the present case involved the fact-specific event of a fist fight and the issue of assault. He doubted that the judge could reliably determine probable cause when presented with only the plaintiff's version of the altercation. "Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process." 898 F. 2d, at 856. Judge Pratt went on to conclude that in his view, the statute was also constitutionally infirm for its fail-

ure to require the plaintiff to post a bond for the protection of the defendant in the event the attachment was ultimately found to have been improvident.

Judge Mahoney was also of the opinion that the statutory provision for attaching real property in civil actions, without a prior hearing and in the absence of extraordinary circumstances, was unconstitutional. He disagreed with Judge Pratt's opinion that a bond was constitutionally required. Judge Newman dissented from the holding that a hearing prior to attachment was constitutionally required and, like Judge Mahoney, disagreed with Judge Pratt on the necessity for a bond.

The dissent's conclusion accorded with the views of the Connecticut Supreme Court, which had previously upheld § 52–278e(b) in *Fermont Division, Dynamics Corp. of America* v. *Smith*, 178 Conn. 393, 423 A. 2d 80 (1979). We granted certiorari to resolve the conflict of authority. 498 U. S. 809 (1990).

II

With this case we return to the question of what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure. Our cases reflect the numerous variations this type of remedy can entail. In *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337 (1969), the Court struck down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing to the wage earner. In *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), the Court likewise found a due process violation in state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk and the posting of a bond. Conversely, the Court upheld a Louisiana *ex parte* procedure allowing a lienholder to have disputed goods sequestered in *Mitchell* v. *W. T. Grant Co.*, *supra*. *Mitchell*, however, carefully noted that *Fuentes* was

decided against "a factual and legal background sufficiently different . . . that it does not require the invalidation of the Louisiana sequestration statute." *Id.*, at 615. Those differences included Louisiana's provision of an immediate postdeprivation hearing along with the option of damages; the requirement that a judge rather than a clerk determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder's interest in preventing waste or alienation of the encumbered property. *Id.*, at 615–618. In *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), the Court again invalidated an *ex parte* garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt postdeprivation hearing. *Id.*, at 606–608.

These cases "underscore the truism that '"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Mathews* v. *Eldridge*, *supra*, at 334 (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)). In *Mathews*, we drew upon our prejudgment remedy decisions to determine what process is due when the government itself seeks to effect a deprivation on its own initiative. 424 U. S., at 334. That analysis resulted in the now familiar threefold inquiry requiring consideration of "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and lastly "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

Here the inquiry is similar, but the focus is different. Prejudgment remedy statutes ordinarily apply to disputes between private parties rather than between an individual and

the government. Such enactments are designed to enable one of the parties to "make use of state procedures with the overt, significant assistance of state officials," and they undoubtedly involve state action "substantial enough to implicate the Due Process Clause." *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 486 (1988). Nonetheless, any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other's property. See *Fuentes* v. *Shevin*, *supra*, at 99–101 (WHITE, J., dissenting). For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

We now consider the *Mathews* factors in determining the adequacy of the procedures before us, first with regard to the safeguards of notice and a prior hearing, and then in relation to the protection of a bond.

III

We agree with the Court of Appeals that the property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. Nor does Connecticut deny that any of these consequences occurs.

Instead, the State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages. See *Sniadach*, *supra*, at 340; *Mitchell*, 416 U. S., at 613. But the Court has never held that only such extreme deprivations trigger due process concern. See *Buchanan* v. *Warley*, 245 U. S. 60, 74 (1917). To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process." *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 85 (1988) (citing *Mitchell*, *supra*, at 604; *Hodge* v. *Muscatine County*, 196 U. S. 276, 281 (1905)).[4]

We also agree with the Court of Appeals that the risk of erroneous deprivation that the State permits here is substantial. By definition, attachment statutes premise a deprivation of property on one ultimate factual contingency—the award of damages to the plaintiff which the defendant may not be able to satisfy. See *Ownbey* v. *Morgan*, 256 U. S. 94, 104–105 (1921); R. Thompson & J. Sebert, Remedies: Damages, Equity and Restitution § 5.01 (1983). For attachments

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[4] Our summary affirmance in *Spielman-Fond, Inc.* v. *Hanson's, Inc.*, 417 U. S. 901 (1974), does not control. In *Spielman-Fond*, the District Court held that the filing of a mechanic's lien did not amount to the taking of a significant property interest. 379 F. Supp. 997, 999 (Ariz. 1973) (three-judge court) *(per curiam)*. A summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion. *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). The facts of *Spielman-Fond* presented an alternative basis for affirmance in any event. Unlike the case before us, the mechanic's lien statute in *Spielman-Fond* required the creditor to have a pre-existing interest in the property at issue. 379 F. Supp., at 997. As we explain below, a heightened plaintiff interest in certain circumstances can provide a ground for upholding procedures that are otherwise suspect. *Infra*, at 15.

before judgment, Connecticut mandates that this determination be made by means of a procedural inquiry that asks whether "there is probable cause to sustain the validity of the plaintiff's claim." Conn. Gen. Stat. § 52–278e(a) (1991). The statute elsewhere defines the validity of the claim in terms of the likelihood "that judgment will be rendered in the matter in favor of the plaintiff." Conn. Gen. Stat. § 52–278c(a)(2) (1991); *Ledgebrook Condominium Assn.* v. *Lusk Corp.*, 172 Conn. 577, 584, 376 A. 2d 60, 63–64 (1977). What probable cause means in this context, however, remains obscure. The State initially took the position, as did the dissent below, that the statute requires a plaintiff to show the objective likelihood of the suit's success. Brief for Petitioners 12; *Pinsky*, 898 F. 2d, at 861–862 (Newman, J., dissenting). Doehr, citing ambiguous state cases, reads the provision as requiring no more than that a plaintiff demonstrate a subjective good-faith belief that the suit will succeed. Brief for Respondent 25–26. *Ledgebrook Condominium Assn.*, *supra*, at 584, 376 A. 2d, at 63–64; *Anderson* v. *Nedovich*, 19 Conn. App. 85, 88, 561 A. 2d 948, 949 (1989). At oral argument, the State shifted its position to argue that the statute requires something akin to the plaintiff stating a claim with sufficient facts to survive a motion to dismiss.

We need not resolve this confusion since the statute presents too great a risk of erroneous deprivation under any of these interpretations. If the statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient, requirement of a complaint and a factual affidavit would permit a court to make these minimal determinations. But neither inquiry adequately reduces the risk of erroneous deprivation. Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations

that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.

Even if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case. As the record shows, and as the State concedes, only a skeletal affidavit need be, and was, filed. The State urges that the reviewing judge normally reviews the complaint as well, but concedes that the complaint may also be conclusory. It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions. And as the Court of Appeals said, in a case like this involving an alleged assault, even a detailed affidavit would give only the plaintiff's version of the confrontation. Unlike determining the existence of a debt or delinquent payments, the issue does not concern "ordinarily uncomplicated matters that lend themselves to documentary proof." *Mitchell*, 416 U. S., at 609. The likelihood of error that results illustrates that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 170–172 (1951) (Frankfurter, J., concurring).

What safeguards the State does afford do not adequately reduce this risk. Connecticut points out that the statute also provides an "expeditiou[s]" postattachment adversary hear-

ing, § 52–278e(c);[5] notice for such a hearing, § 52–278e(b); judicial review of an adverse decision, § 52–278l(a); and a double damages action if the original suit is commenced without probable cause, § 52–568(a)(1). Similar considerations were present in *Mitchell*, where we upheld Louisiana's sequestration statute despite the lack of predeprivation notice and hearing. But in *Mitchell*, the plaintiff had a vendor's lien to protect, the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof, 416 U. S., at 609–610, and the plaintiff was required to put up a bond. None of these factors diminishing the need for a predeprivation hearing is present in this case. It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented. "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes*, 407 U. S., at 86.

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[5] The parties vigorously dispute whether a defendant can in fact receive a prompt hearing. Doehr contends that the State's rules of practice prevent the filing of any motion—including a motion for the mandated postattachment hearing—until the return date on the complaint, which in this case was 30 days after service. Connecticut Practice Book § 114 (1988). Under state law at least 12 days must elapse between service on the defendant and the return date. Conn. Gen. Stat. § 52–46 (1991). The State counters that the postattachment hearing is available upon request. See *Fermont Division, Dynamics Corp. of America* v. *Smith*, 178 Conn. 393, 397–398, 423 A. 2d 80, 83 (1979) ("Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim"). We assume, without deciding, that the hearing is prompt. Even on this assumption, the State's procedures fail to provide adequate safeguards against the erroneous deprivation of the property interest at stake.

Finally, we conclude that the interests in favor of an *ex parte* attachment, particularly the interests of the plaintiff, are too minimal to supply such a consideration here. The plaintiff had no existing interest in Doehr's real estate when he sought the attachment. His only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action. Yet there was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. See *Mitchell*, *supra*, at 609; *Fuentes*, *supra*, at 90–92; *Sniadach*, 395 U. S., at 339. Absent such allegations, however, the plaintiff's interest in attaching the property does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.

No interest the government may have affects the analysis. The State's substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves. Here the plaintiff's interest is *de minimis*. Moreover, the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate postdeprivation hearing. Conn. Gen. Stat. §§ 52–278e(b) and (c) (1991); *Fermont*, 178 Conn., at 397–398, 423 A. 2d, at 83.

Historical and contemporary practices support our analysis. Prejudgment attachment is a remedy unknown at common law. Instead, "it traces its origin to the Custom of London, under which a creditor might attach money or goods of the defendant either in the plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court." *Ownbey*, 256 U. S., at 104. Generally speaking, attachment measures in both England and this

country had several limitations that reduced the risk of erroneous deprivation which Connecticut permits. Although attachments ordinarily did not require prior notice or a hearing, they were usually authorized only where the defendant had taken or threatened to take some action that would place the satisfaction of the plaintiff's potential award in jeopardy. See C. Drake, Law of Suits by Attachment, §§ 40–82 (1866) (hereinafter Drake); 1 R. Shinn, Attachment and Garnishment § 86 (1896) (hereinafter Shinn). Attachments, moreover, were generally confined to claims by creditors. Drake §§ 9–10; Shinn § 12. As we and the Court of Appeals have noted, disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits. Tort actions, like the assault and battery claim at issue here, do not. See *Mitchell*, *supra*, at 609–610. Finally, as we will discuss below, attachment statutes historically required that the plaintiff post a bond. Drake §§ 114–183; Shinn § 153.

Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place. See Appendix to this opinion. Twenty-seven States, as well as the District of Columbia, permit attachments only when some extraordinary circumstance is present. In such cases, preattachment hearings are not required but postattachment hearings are provided. Ten States permit attachment without the presence of such factors but require prewrit hearings unless one of those factors is shown. Six States limit attachments to extraordinary circumstance cases, but the writ will not issue prior to a hearing unless there is a showing of some even more compelling condition.[6] Three States always require a

[6] One State, Pennsylvania, has not had an attachment statute or rule since the decision in *Jonnet* v. *Dollar Savings Bank of New York City*, 530 F. 2d 1123 (CA3 1976).

preattachment hearing. Only Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests. Even those States permit *ex parte* deprivations only in certain types of cases: Rhode Island does so only when the claim is equitable; Connecticut and Washington do so only when real estate is to be attached, and even Washington requires a bond. Conversely, the States for the most part no longer confine attachments to creditor claims. This development, however, only increases the importance of the other limitations.

We do not mean to imply that any given exigency requirement protects an attachment from constitutional attack. Nor do we suggest that the statutory measures we have surveyed are necessarily free of due process problems or other constitutional infirmities in general. We do believe, however, that the procedures of almost all the States confirm our view that the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.

IV

A

Although a majority of the Court does not reach the issue, JUSTICES MARSHALL, STEVENS, O'CONNOR, and I deem it appropriate to consider whether due process also requires the plaintiff to post a bond or other security in addition to requiring a hearing or showing of some exigency.[7]

[7] Ordinarily we will not address a contention advanced by a respondent that would enlarge his or her rights under a judgment, without the respondent filing a cross-petition for certiorari. *E. g., Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 119, n. 14 (1985). Here the Court of Appeals rejected Doehr's argument that § 52–278e(a)(1) violates due process in failing to mandate a preattachment bond. Nonetheless, this case involves considerations that in the past have prompted us "to consider the question highlighted by respondent." *Berkemer* v. *McCarty*, 468

As noted, the impairments to property rights that attachments effect merit due process protection. Several consequences can be severe, such as the default of a homeowner's mortgage. In the present context, it need only be added that we have repeatedly recognized the utility of a bond in protecting property rights affected by the mistaken award of prejudgment remedies. *Di-Chem*, 419 U. S., at 610, 611 (Powell, J., concurring in judgment); *id.*, at 619 (BLACKMUN, J., dissenting); *Mitchell*, 416 U. S., at 606, n. 8.

Without a bond, at the time of attachment, the danger that these property rights may be wrongfully deprived remains unacceptably high even with such safeguards as a hearing or exigency requirement. The need for a bond is especially apparent where extraordinary circumstances justify an attachment with no more than the plaintiff's *ex parte* assertion of a claim. We have already discussed how due process tolerates, and the States generally permit, the otherwise impermissible chance of erroneously depriving the defendant in such situations in light of the heightened interest of the plaintiff. Until a postattachment hearing, however, a defendant has no protection against damages sustained where no extraordinary circumstance in fact existed or the plaintiff's likelihood of recovery was nil. Such protection is what a bond can supply. Both the Court and its individual Members have repeatedly found the requirement of a bond to play an essential role in reducing what would have been too great a degree of risk in precisely this type of circumstance. *Mitchell*,

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U. S. 420, 435–436, n. 23 (1984). First, as our cases have shown, the notice and hearing question and the bond question are intertwined and can fairly be considered facets of the same general issue. Thus, "[w]ithout undue strain, the position taken by respondent before this Court . . . might be characterized as an argument in support of the judgment below" insofar as a discussion of notice and a hearing cannot be divorced from consideration of a bond. *Ibid.* Second, this aspect of prejudgment attachment "plainly warrants our attention, and with regard to which the lower courts are in need of guidance." *Ibid.* Third, "and perhaps most importantly, both parties have briefed and argued the question." *Ibid.*

supra, at 610, 619; *Di-Chem*, 419 U. S., at 613 (Powell, J., concurring in judgment); *id.*, at 619 (BLACKMUN, J., dissenting); *Fuentes*, 407 U. S., at 101 (WHITE, J., dissenting).

But the need for a bond does not end here. A defendant's property rights remain at undue risk even when there has been an adversarial hearing to determine the plaintiff's likelihood of recovery. At best, a court's initial assessment of each party's case cannot produce more than an educated prediction as to who will win. This is especially true when, as here, the nature of the claim makes any accurate prediction elusive. See *Mitchell*, *supra*, at 609–610. In consequence, even a full hearing under a proper probable-cause standard would not prevent many defendants from having title to their homes impaired during the pendency of suits that never result in the contingency that ultimately justifies such impairment, namely, an award to the plaintiff. Attachment measures currently on the books reflect this concern. All but a handful of States require a plaintiff's bond despite also affording a hearing either before, or (for the vast majority, only under extraordinary circumstances) soon after, an attachment takes place. See Appendix to this opinion. Bonds have been a similarly common feature of other prejudgment remedy procedures that we have considered, whether or not these procedures also included a hearing. See *Ownbey*, 256 U. S., at 101–102, n. 1; *Fuentes*, *supra*, at 73, n. 6, 75–76, n. 7, 81–82; *Mitchell*, *supra*, at 606, and n. 6; *Di-Chem*, *supra*, at 602–603, n. 1, 608.

The State stresses its double damages remedy for suits that are commenced without probable cause. Conn. Gen. Stat. § 52–568(a)(1).[8] This remedy, however, fails to make

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[8] Section 52–568(a)(1) provides:

"Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double dam-

up for the lack of a bond. As an initial matter, the meaning of "probable cause" in this provision is no more clear here than it was in the attachment provision itself. Should the term mean the plaintiff's good faith or the facial adequacy of the complaint, the remedy is clearly insufficient. A defendant who was deprived where there was little or no likelihood that the plaintiff would obtain a judgment could nonetheless recover only by proving some type of fraud or malice or by showing that the plaintiff had failed to state a claim. Problems persist even if the plaintiff's ultimate failure permits recovery. At best a defendant must await a decision on the merits of the plaintiff's complaint, even assuming that a § 52–568(a)(1) action may be brought as a counterclaim. *Hydro Air of Connecticut, Inc.* v. *Versa Technologies, Inc.*, 99 F. R. D. 111, 113 (Conn. 1983). Settlement, under Connecticut law, precludes seeking the damages remedy, a fact that encourages the use of attachments as a tactical device to pressure an opponent to capitulate. *Blake* v. *Levy*, 191 Conn. 257, 464 A. 2d 52 (1983). An attorney's advice that there is probable cause to commence an action constitutes a complete defense, even if the advice was unsound or erroneous. *Vandersluis* v. *Weil*, 176 Conn. 353, 361, 407 A. 2d 982, 987 (1978). Finally, there is no guarantee that the original plaintiff will have adequate assets to satisfy an award that the defendant may win.

Nor is there any appreciable interest against a bond requirement. Section 52–278e(a)(1) does not require a plaintiff to show exigent circumstances nor any pre-existing interest in the property facing attachment. A party must show more than the mere existence of a claim before subjecting an opponent to prejudgment proceedings that carry a significant risk of erroneous deprivation. See *Mitchell*, *supra*, at 604–609; *Fuentes*, *supra*, at 90–92; *Sniadach*, 395 U. S., at 339.

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ages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

B

Our foregoing discussion compels the four of us to consider whether a bond excuses the need for a hearing or other safeguards altogether. If a bond is needed to augment the protections afforded by preattachment and postattachment hearings, it arguably follows that a bond renders these safeguards unnecessary. That conclusion is unconvincing, however, for it ignores certain harms that bonds could not undo but that hearings would prevent. The law concerning attachments has rarely, if ever, required defendants to suffer an encumbered title until the case is concluded without any prior opportunity to show that the attachment was unwarranted. Our cases have repeatedly emphasized the importance of providing a prompt postdeprivation hearing at the very least. *Mitchell*, 416 U. S., at 606; *Di-Chem*, 419 U. S., at 606–607. Every State but one, moreover, expressly requires a preattachment or postattachment hearing to determine the propriety of an attachment.

The necessity for at least a prompt postattachment hearing is self-evident because the right to be compensated at the end of the case, if the plaintiff loses, for all provable injuries caused by the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held. An individual with an immediate need or opportunity to sell a property can neither do so, nor otherwise satisfy that need or recreate the opportunity. The same applies to a parent in need of a home equity loan for a child's education, an entrepreneur seeking to start a business on the strength of an otherwise strong credit rating, or simply a homeowner who might face the disruption of having a mortgage placed in technical default. The extent of these harms, moreover, grows with the length of the suit. Here, oral argument indicated that civil suits in Connecticut commonly take up to four to seven years for completion. Tr. of Oral Arg. 44. Many state attachment statutes require

that the amount of a bond be anywhere from the equivalent to twice the amount the plaintiff seeks. See, *e. g.*, Utah Rule of Civ. Proc. 64C(b). These amounts bear no relation to the harm the defendant might suffer even assuming that money damages can make up for the foregoing disruptions. It should be clear, however, that such an assumption is fundamentally flawed. Reliance on a bond does not sufficiently account for the harms that flow from an erroneous attachment to excuse a State from reducing that risk by means of a timely hearing.

If a bond cannot serve to dispense with a hearing immediately after attachment, neither is it sufficient basis for not providing a preattachment hearing in the absence of exigent circumstances even if in any event a hearing would be provided a few days later. The reasons are the same: a wrongful attachment can inflict injury that will not fully be redressed by recovery on the bond after a prompt postattachment hearing determines that the attachment was invalid.

Once more, history and contemporary practices support our conclusion. Historically, attachments would not issue without a showing of extraordinary circumstances even though a plaintiff bond was almost invariably required in addition. Drake §§ 4, 114; Shinn §§ 86, 153. Likewise, all but eight States currently require the posting of a bond. Out of this 42-State majority, all but one requires a preattachment hearing, a showing of some exigency, or both, and all but one expressly require a postattachment hearing when an attachment has been issued *ex parte*. See Appendix to this opinion. This testimony underscores the point that neither a hearing nor an extraordinary circumstance limitation eliminates the need for a bond, no more than a bond allows waiver of these other protections. To reconcile the interests of the defendant and the plaintiff accurately, due process generally requires all of the above.

V

Because Connecticut's prejudgment remedy provision, Conn. Gen. Stat. § 52–278e(a)(1), violates the requirements of due process by authorizing prejudgment attachment without prior notice or a hearing, the judgment of the Court of Appeals is affirmed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Prejudgment Attachment Statutes

	Preattach. Hrg. Required Unless Exigent Circs.	*Attachment Only in Exigent Circs.; No Preattach. Hrg. Required*	*Preattach. Hrg. Even in Most Exigent Circs.*	*Bond Required*	*Postattach. Hrg. Required*
Alabama		X		X	X
Alaska	Preattachment hrg. always required.			X	
Arizona	X			X	X
Arkansas		X		X	X
California	X			X	X
Colorado		X		X	X
Connecticut	X (or unless attachment of real estate)				X
Delaware		X		X	X
DC		X		X	X
Florida		X		X	X
Georgia		X		X	X
Hawaii	Preattachment hrg. always required.			X	X
Idaho	X			X	X
Illinois		X		X	X
Indiana		X		X	X
Iowa		X		X	X
Kansas		X		X	X
Kentucky			X	X	
Louisiana		X		X	X

Prejudgment Attachment Statutes—Continued

	Preattach. Hrg. Required Unless Exigent Circs.	*Attachment Only in Exigent Circs.; No Preattach. Hrg. Required*	*Preattach. Hrg. Even in Most Exigent Circs.*	*Bond Required*	*Postattach. Hrg. Required*
Maine	x				x
Maryland		x		x	x
Massachusetts	x			x/o[1]	x
Michigan		x			x
Minnesota			x	x	x
Mississippi		x		x	x
Missouri		x		x	x
Montana		x		x	x
Nebraska		x		x	x
Nevada	x			x	x
New Hampshire	x				x
New Jersey	x			x/o	x
New Mexico		x		x	x
New York		x		x	x
North Carolina		x		x	x
North Dakota		x		x	x
Ohio			x	x	x
Oklahoma	x			x	x
Oregon	Preattachment hrg. always required.			x	
Pennsylvania	Rescinded in light of 530 F. 2d 1123 (CA3 1976).				
Rhode Island	x (but not if equitable claim)			x/o	
South Carolina		x		x	x
South Dakota		x		x	x
Tennessee		x		x	x[2]
Texas			x	x	x
Utah			x	x	x
Vermont	x				x

[1] An "x/o" in the "Bond Required" column indicates that a bond may be required at the discretion of the court.

[2] The court may, under certain circumstances, quash the attachment at the defendant's request without a hearing.

Prejudgment Attachment Statutes—Continued

	Preattach. Hrg. Required Unless Exigent Circs.	*Attachment Only in Exigent Circs.; No Preattach. Hrg. Required*	*Preattach. Hrg. Even in Most Exigent Circs.*	*Bond Required*	*Postattach. Hrg. Required*
Virginia		X		X	X
Washington			X	X[3]	X
			(except for real estate on a contract claim)		
West Virginia		X		X	X
Wisconsin		X		X	X
Wyoming			X	X	X

[3] A bond is required except in situations in which the plaintiff seeks to attach the real property of a defendant who, after diligent efforts, cannot be served.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I agree with the Court that the Connecticut attachment statute, "as applied to this case," *ante*, at 4, fails to satisfy the Due Process Clause of the Fourteenth Amendment. I therefore join Parts I, II, and III of its opinion. Unfortunately, the remainder of the opinion does not confine itself to the facts of this case, but enters upon a lengthy disquisition as to what combination of safeguards are required to satisfy due process in hypothetical cases not before the Court. I therefore do not join Part IV.

As the Court's opinion points out, the Connecticut statute allows attachment not merely for a creditor's claim, but for a tort claim of assault and battery; it affords no opportunity for a predeprivation hearing; it contains no requirement that there be "exigent circumstances," such as an effort on the part of the defendant to conceal assets; no bond is required from the plaintiff; and the property attached is one in which the plaintiff has no pre-existing interest. The Court's opin-

ion is, in my view, ultimately correct when it bases its holding of unconstitutionality of the Connecticut statute as applied here on our cases of *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337 (1969); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975). But I do not believe that the result follows so inexorably as the Court's opinion suggests. All of the cited cases dealt with personalty—bank deposits or chattels—and each involved the physical seizure of the property itself, so that the defendant was deprived of its use. These cases, which represented something of a revolution in the jurisprudence of procedural due process, placed substantial limits on the methods by which creditors could obtain a lien on the assets of a debtor prior to judgment. But in all of them the debtor was deprived of the use and possession of the property. In the present case, on the other hand, Connecticut's prejudgment attachment on real property statute, which secures an incipient lien for the plaintiff, does not deprive the defendant of the use or possession of the property.

The Court's opinion therefore breaks new ground, and I would point out, more emphatically than the Court does, the limits of today's holding. In *Spielman-Fond, Inc.* v. *Hanson's, Inc.*, 379 F. Supp. 997, 999 (Ariz. 1973), the District Court held that the filing of a mechanics' lien did not cause the deprivation of a significant property interest of the owner. We summarily affirmed that decision. 417 U. S. 901 (1974). Other courts have read this summary affirmance to mean that the mere imposition of a lien on real property, which does not disturb the owner's use or enjoyment of the property, is not a deprivation of property calling for procedural due process safeguards. I agree with the Court, however, that upon analysis the deprivation here is a significant one, even though the owner remains in undisturbed possession. "For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise

alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Ante*, at 11. Given the elaborate system of title records relating to real property which prevails in all of our States, a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him.

But in *Spielman-Fond, Inc.*, *supra*, there was, as the Court points out, *ante*, at 12, n. 4, an alternative basis available to this Court for affirmance of that decision. Arizona recognized a pre-existing lien in favor of unpaid mechanics and materialmen who had contributed labor or supplies which were incorporated in improvements to real property. The existence of such a lien upon the very property ultimately posted or noticed distinguishes those cases from the present one, where the plaintiff had no pre-existing interest in the real property which he sought to attach. Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. Since neither the labor nor the material can be reclaimed once it has become a part of the realty, this is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy against a property owner who has defaulted on his promise to pay for the labor and the materials. To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes.

Petitioners in their brief rely in part on our summary affirmance in *Bartlett* v. *Williams*, 464 U. S. 801 (1983). That case involved a *lis pendens*, in which the question presented to this Court was whether such a procedure could be valid when the only protection afforded to the owner of land affected by the *lis pendens* was a postsequestration hearing.

A notice of *lis pendens* is a well-established, traditional remedy whereby a plaintiff (usually a judgment creditor) who brings an action to enforce an interest in property to which the defendant has title gives notice of the pendency of such action to third parties; the notice causes the interest which he establishes, if successful, to relate back to the date of the filing of the *lis pendens*. The filing of such notice will have an effect upon the defendant's ability to alienate the property, or to obtain additional security on the basis of title to the property, but the effect of the *lis pendens* is simply to give notice to the world of the remedy being sought in the lawsuit itself. The *lis pendens* itself creates no additional right in the property on the part of the plaintiff, but simply allows third parties to know that a lawsuit is pending in which the plaintiff is seeking to establish such a right. Here, too, the fact that the plaintiff already claims an interest in the property which he seeks to enforce by a lawsuit distinguishes this class of cases from the Connecticut attachment employed in the present case.

Today's holding is a significant development in the law; the only cases dealing with real property cited in the Court's opinion, *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 85 (1988), and *Hodge* v. *Muscatine County*, 196 U. S. 276, 281 (1905), arose out of lien foreclosure sales in which the question was whether the owner was entitled to proper notice. The change is dramatically reflected when we compare today's decision with the almost casual statement of Justice Holmes, writing for a unanimous Court in *Coffin Brothers & Co.* v. *Bennett*, 277 U. S. 29, 31 (1928):

> "[N]othing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit."

The only protection accorded to the debtor in that case was the right to contest his liability in a postdeprivation proceeding.

It is both unwise and unnecessary, I believe, for the plurality to proceed, as it does in Part IV, from its decision of the case before it to discuss abstract and hypothetical situations not before it. This is especially so where we are dealing with the Due Process Clause which, as the Court recognizes, "'"unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,"'" *ante*, at 10. And it is even more true in a case involving constitutional limits on the methods by which the States may transfer or create interests in real property; in other areas of the law, dicta may do little damage, but those who insure titles or write title opinions often do not enjoy the luxury of distinguishing detween dicta and holding.

The two elements of due process with which the Court concerns itself in Part IV—the requirements of a bond and of "exigent circumstances"—prove to be upon analysis so vague that the discussion is not only unnecessary, but not particularly useful. Unless one knows what the terms and conditions of a bond are to be, the requirement of a "bond" in the abstract means little. The amount to be secured by the bond and the conditions of the bond are left unaddressed—is there to be liability on the part of a plaintiff if he is ultimately unsuccessful in the underlying lawsuit, or is it instead to be conditioned on some sort of good-faith test? The "exigent circumstances" referred to by the Court are admittedly equally vague; nonresidency appears to be enough in some States, an attempt to conceal assets is required in others, an effort to flee the jurisdiction in still others. We should await concrete cases which present questions involving bonds and exigent circumstances before we attempt to decide when and if the Due Process Clause of the Fourteenth Amendment requires them as prerequisites for a lawful attachment.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

Since the manner of attachment here was not a recognized procedure at common law, cf. *Pacific Mut. Life Ins. Co.* v.

Haslip, 499 U. S. 1, 24 (1991) (SCALIA, J., concurring in judgment), I agree that its validity under the Due Process Clause should be determined by applying the test we set forth in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); and I agree that it fails that test. I join Parts I and III of the Court's opinion, and concur in the judgment of the Court.

CHAMBERS *v.* NASCO, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–256. Argued February 27, 1991—Decided June 6, 1991

Petitioner Chambers, the sole shareholder and director of a company that operated a television station in Louisiana, agreed to sell the station's facilities and broadcast license to respondent NASCO, Inc. Chambers soon changed his mind and, both before and after NASCO filed this diversity action for specific performance in the District Court, engaged in a series of actions within and without that court and in proceedings before the Federal Communications Commission, the Court of Appeals, and this Court, which were designed to frustrate the sale's consummation. On remand following the Court of Appeals' affirmance of judgment on the merits for NASCO, the District Court, on NASCO's motion and following full briefing and a hearing, imposed sanctions against Chambers in the form of attorney's fees and expenses totaling almost $1 million, representing the entire amount of NASCO's litigation costs paid to its attorneys. The court noted that the alleged sanctionable conduct was that Chambers had (1) attempted to deprive the court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of the court, (2) filed false and frivolous pleadings, and (3) "attempted, by other tactics of delay, oppression, harassment and massive expense to reduce [NASCO] to exhausted compliance." The court deemed Federal Rule of Civil Procedure 11—which provides for the imposition of attorney's fees as a sanction for the improper filing of papers with a court—insufficient to support the sanction against Chambers, since the Rule does not reach conduct in the foregoing first and third categories, and since it would have been impossible to assess sanctions at the time the papers in the second category were filed because their falsity did not become apparent until after the trial on the merits. The court likewise declined to impose sanctions under 28 U. S. C. § 1927, both because the statute's authorization of an attorney's fees sanction applies only to attorneys who unreasonably and vexatiously multiply proceedings, and therefore would not reach Chambers, and because the statute was not broad enough to reach "acts which degrade the judicial system." The court therefore relied on its inherent power in imposing sanctions. In affirming, the Court of Appeals, *inter alia*, rejected Chambers' argument that a federal court sitting in diversity must look to state law, not

the court's inherent power, to assess attorney's fees as a sanction for bad-faith conduct in litigation.

Held: The District Court properly invoked its inherent power in assessing as a sanction for Chambers' bad-faith conduct the attorney's fees and related expenses paid by NASCO. Pp. 42–58.

(a) Federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them. In invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction, which may range from dismissal of a lawsuit to an assessment of attorney's fees. Although the "American Rule" prohibits the shifting of attorney's fees in most cases, see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 259, an exception allows federal courts to exercise their inherent power to assess such fees as a sanction when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, *id.*, at 258–259, 260, as when the party practices a fraud upon the court, *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 580, or delays or disrupts the litigation or hampers a court order's enforcement, *Hutto* v. *Finney*, 437 U. S. 678, 689, n. 14. Pp. 43–46.

(b) There is nothing in § 1927, Rule 11, or other Federal Rules of Civil Procedure authorizing attorney's fees as a sanction, or in this Court's decisions interpreting those other sanctioning mechanisms, that warrants a conclusion that, taken alone or together, the other mechanisms displace courts' inherent power to impose attorney's fees as a sanction for bad-faith conduct. Although a court ordinarily should rely on such rules when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to the task. The District Court did not abuse its discretion in resorting to the inherent power in the circumstances of this case. Although some of Chambers' conduct might have been reached through the other sanctioning mechanisms, all of that conduct was sanctionable. Requiring the court to apply the other mechanisms to discrete occurrences before invoking the inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves. Nor did the court's reliance on the inherent power thwart the mandatory terms of Rules 11 and 26(g). Those Rules merely require that "an appropriate sanction" be imposed, without specifying *which* sanction is required. *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, distinguished. Pp. 46–51.

(c) There is no merit to Chambers' assertion that a federal court sitting in diversity cannot use its inherent power to assess attorney's fees as a sanction unless the applicable state law recognizes the "bad-faith" exception to the general American Rule against fee shifting. Although footnote 31 in *Alyeska* tied a diversity court's inherent power to award fees to the existence of a state law giving a right thereto, that limitation applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees. Here the District Court did not attempt to sanction Chambers for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both NASCO and the court throughout the litigation. The inherent power to tax fees for such conduct cannot be made subservient to any state policy without transgressing the boundaries set out in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, and *Hanna* v. *Plumer*, 380 U. S. 460, for fee shifting here is not a matter of substantive remedy, but is a matter of vindicating judicial authority. Thus, although Louisiana law prohibits punitive damages for a bad-faith breach of contract, this substantive state policy is not implicated. Pp. 51–55.

(d) Based on the circumstances of this case, the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees. Chambers' arguments to the contrary are without merit. First, although the sanction was not assessed until the conclusion of the litigation, the court's reliance on its inherent power did not represent an end run around Rule 11's notice requirements, since Chambers received repeated timely warnings both from NASCO and the court that his conduct was sanctionable. Second, the fact that the entire amount of fees was awarded does not mean that the court failed to tailor the sanction to the particular wrong, in light of the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated. Third, the court did not abuse its discretion by failing to require NASCO to mitigate its expenses, since Chambers himself made a swift conclusion to the litigation by means of summary judgment impossible by continuing to assert that material factual disputes existed. Fourth, the court did not err in imposing sanctions for conduct before other tribunals, since, as long as Chambers received an appropriate hearing, he may be sanctioned for abuses of process beyond the courtroom. Finally, the claim that the award is not "personalized" as to Chambers' responsibility for the challenged conduct is flatly contradicted

by the court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue. Pp. 55–58.

894 F. 2d 696, affirmed.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 58. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SOUTER, J., joined, *post*, p. 60.

Mack E. Barham argued the cause for petitioner. With him on the briefs were *Robert E. Arceneaux* and *Russell T. Tritico*.

Joel I. Klein argued the cause for respondent. With him on the brief were *Christopher D. Cerf*, *David A. Bono*, *Aubrey B. Harwell, Jr.*, *Jon D. Ross*, *John B. Scofield*, and *David L. Hoskins*.

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to explore the scope of the inherent power of a federal court to sanction a litigant for bad-faith conduct. Specifically, we are asked to determine whether the District Court, sitting in diversity, properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses paid by the party's opponent to its attorneys. We hold that the District Court acted within its discretion, and we therefore affirm the judgment of the Court of Appeals.

I

This case began as a simple action for specific performance of a contract, but it did not remain so.[1] Petitioner G. Russell Chambers was the sole shareholder and director of Calcasieu Television and Radio, Inc. (CTR), which operated television station KPLC–TV in Lake Charles, Louisiana. On August 9, 1983, Chambers, acting both in his individual capacity and on behalf of CTR, entered into a purchase agree-

[1] The facts recited here are taken from the findings of the District Court, which were not disturbed by the Court of Appeals.

ment to sell the station's facilities and broadcast license to respondent NASCO, Inc., for a purchase price of $18 million. The agreement was not recorded in the parishes in which the two properties housing the station's facilities were located. Consummation of the agreement was subject to the approval of the Federal Communications Commission (FCC); both parties were obligated to file the necessary documents with the FCC no later than September 23, 1983. By late August, however, Chambers had changed his mind and tried to talk NASCO out of consummating the sale. NASCO refused. On September 23, Chambers, through counsel, informed NASCO that he would not file the necessary papers with the FCC.

NASCO decided to take legal action. On Friday, October 14, 1983, NASCO's counsel informed counsel for Chambers and CTR that NASCO would file suit the following Monday in the United States District Court for the Western District of Louisiana, seeking specific performance of the agreement, as well as a temporary restraining order (TRO) to prevent the alienation or encumbrance of the properties at issue. NASCO provided this notice in accordance with Federal Rule of Civil Procedure 65 and Rule 11 of the District Court's Local Rules (now Rule 10), both of which are designed to give a defendant in a TRO application notice of the hearing and an opportunity to be heard.

The reaction of Chambers and his attorney, A. J. Gray III, was later described by the District Court as having "emasculated and frustrated the purposes of these rules and the powers of [the District] Court by utilizing this notice to prevent NASCO's access to the remedy of specific performance." *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 623 F. Supp. 1372, 1383 (1985). On Sunday, October 16, 1983, the pair acted to place the properties at issue beyond the reach of the District Court by means of the Louisiana Public Records Doctrine. Because the purchase agreement had never been recorded, they determined that if the prop-

erties were sold to a third party, and if the deeds were recorded before the issuance of a TRO, the District Court would lack jurisdiction over the properties.

To this end, Chambers and Gray created a trust, with Chambers' sister as trustee and Chambers' three adult children as beneficiaries. The pair then directed the president of CTR, who later became Chambers' wife, to execute warranty deeds conveying the two tracts at issue to the trust for a recited consideration of $1.4 million dollars. Early Monday morning, the deeds were recorded. The trustee, as purchaser, had not signed the deeds; none of the consideration had been paid; and CTR remained in possession of the properties. Later that morning, NASCO's counsel appeared in the District Court to file the complaint and seek the TRO. With NASCO's counsel present, the District Judge telephoned Gray. Despite the judge's queries concerning the possibility that CTR was negotiating to sell the properties to a third person, Gray made no mention of the recordation of the deeds earlier that morning. *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 124 F. R. D. 120, 126, n. 8 (1989). That afternoon, Chambers met with his sister and had her sign the trust documents and a $1.4 million note to CTR. The next morning, Gray informed the District Court by letter of the recordation of the deeds the day before and admitted that he had intentionally withheld the information from the court.

Within the next few days, Chambers' attorneys prepared a leaseback agreement from the trustee to CTR, so that CTR could remain in possession of the properties and continue to operate the station. The following week, the District Court granted a preliminary injunction against Chambers and CTR and entered a second TRO to prevent the trustee from alienating or encumbering the properties. At that hearing, the District Judge warned that Gray's and Chambers' conduct had been unethical.

Despite this early warning, Chambers, often acting through his attorneys, continued to abuse the judicial process. In November 1983, in defiance of the preliminary injunction, he refused to allow NASCO to inspect CTR's corporate records. The ensuing civil contempt proceedings resulted in the assessment of a $25,000 fine against Chambers personally. *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115 (1984). Two subsequent appeals from the contempt order were dismissed for lack of a final judgment. See *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, No. 84–9037 (CA5, May 29, 1984); *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 752 F. 2d 157 (CA5 1985).

Undeterred, Chambers proceeded with "a series of meritless motions and pleadings and delaying actions." 124 F. R. D., at 127. These actions triggered further warnings from the court. At one point, acting *sua sponte*, the District Judge called a status conference to find out why bankers were being deposed. When informed by Chambers' counsel that the purpose was to learn whether NASCO could afford to pay for the station, the court canceled the depositions consistent with its authority under Federal Rule of Civil Procedure 26(g).

At the status conference nine days before the April 1985 trial date,[2] the District Judge again warned counsel that further misconduct would not be tolerated.[3] Finally, on the eve of trial, Chambers and CTR stipulated that the purchase agreement was enforceable and that Chambers had breached the agreement on September 23, 1983, by failing to file the

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[2] The trial date itself reflected delaying tactics. Trial had been set for February 1985, but in January, Gray, on behalf of Chambers, filed a motion to recuse the judge. The motion was denied, as was the subsequent writ of mandamus filed in the Court of Appeals.

[3] To make his point clear, the District Judge gave counsel copies of Judge Schwarzer's then-recent article, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F. R. D. 181 (1985).

necessary papers with the FCC. At trial, the only defense presented by Chambers was the Public Records Doctrine.

In the interlude between the trial and the entry of judgment during which the District Court prepared its opinion, Chambers sought to render the purchase agreement meaningless by seeking permission from the FCC to build a new transmission tower for the station and to relocate the transmission facilities to that site, which was not covered by the agreement. Only after NASCO sought contempt sanctions did Chambers withdraw the application.

The District Court entered judgment on the merits in NASCO's favor, finding that the transfer of the properties to the trust was a simulated sale and that the deeds purporting to convey the property were "null, void, and of no effect." 623 F. Supp., at 1385. Chambers' motions, filed in the District Court, the Court of Appeals, and this Court, to stay the judgment pending appeal were denied. Undeterred, Chambers convinced CTR officials to file formal oppositions to NASCO's pending application for FCC approval of the transfer of the station's license, in contravention of both the District Court's injunctive orders and its judgment on the merits. NASCO then sought contempt sanctions for a third time, and the oppositions were withdrawn.

When Chambers refused to prepare to close the sale, NASCO again sought the court's help. A hearing was set for July 16, 1986, to determine whether certain equipment was to be included in the sale. At the beginning of the hearing, the court informed Chambers' new attorney, Edwin A. McCabe,[4] that further sanctionable conduct would not be tolerated. When the hearing was recessed for several days, Chambers, without notice to the court or NASCO, removed from service at the station all of the equipment at issue, forcing the District Court to order that the equipment be returned to service.

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[4] Gray had resigned as counsel for Chambers and CTR several months previously.

Immediately following oral argument on Chambers' appeal from the District Court's judgment on the merits, the Court of Appeals, ruling from the bench, found the appeal frivolous. The court imposed appellate sanctions in the form of attorney's fees and double costs, pursuant to Federal Rule of Appellate Procedure 38, and remanded the case to the District Court with orders to fix the amount of appellate sanctions and to determine whether further sanctions should be imposed for the manner in which the litigation had been conducted. *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 797 F. 2d 975 (CA5 1986) *(per curiam)* (unpublished order).

On remand, NASCO moved for sanctions, invoking the District Court's inherent power, Fed. Rule Civ. Proc. 11, and 28 U. S. C. § 1927. After full briefing and a hearing, see 124 F. R. D., at 141, n. 11, the District Court determined that sanctions were appropriate "for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit to this date." *Id.*, at 123. At the end of an extensive opinion recounting what it deemed to have been sanctionable conduct during this period, the court imposed sanctions against Chambers in the form of attorney's fees and expenses totaling $996,644.65, which represented the entire amount of NASCO's litigation costs paid to its attorneys.[5]

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[5] In calculating the award, the District Court deducted the amounts previously awarded as compensatory damages for contempt, as well as the amount awarded as appellate sanctions. 124 F. R. D., at 133–134.

The court also sanctioned other individuals, who are not parties to the action in this Court. Chambers' sister, the trustee, was sanctioned by a reprimand; attorney Gray was disbarred and prohibited from seeking readmission for three years; attorney Richard A. Curry, who represented the trustee, was suspended from practice before the court for six months; and attorney McCabe was suspended for five years. *Id.*, at 144–146. Although these sanctions did not affect the bank accounts of these individuals, they were nevertheless substantial sanctions and were as proportionate to the conduct at issue as was the monetary sanction imposed on

In so doing, the court rejected Chambers' argument that he had merely followed the advice of counsel, labeling him "the strategist," *id.*, at 132, behind a scheme devised "first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance," *id.*, at 136.

In imposing the sanctions, the District Court first considered Federal Rule of Civil Procedure 11. It noted that the alleged sanctionable conduct was that Chambers and the other defendants had "(1) attempted to deprive this Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance." 124 F. R. D., at 138. The court recognized that the conduct in the first and third categories could not be reached by Rule 11, which governs only papers filed with a court. As for the second category, the court explained that the falsity of the pleadings at issue did not become apparent until after the trial on the merits, so that it would have been impossible to assess sanctions at the time the papers were filed. *Id.*, at 138–139. Consequently, the District Court deemed Rule 11 "insufficient" for its purposes. *Id.*, at 139. The court likewise declined to impose sanctions under § 1927,[6] both because the statute applies only to attorneys, and therefore would not reach Chambers, and because the statute was not broad enough to reach "acts

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Chambers. Indeed, in the case of the disbarment of attorney Gray, the court recognized that the penalty was among the harshest possible sanctions and one which derived from its authority to supervise those admitted to practice before it. See *id.*, at 140–141.

[6] That statute provides:

"Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U. S. C. § 1927.

which degrade the judicial system," including "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court." *Ibid.* The court therefore relied on its inherent power in imposing sanctions, stressing that "[t]he wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court." *Ibid.*

The Court of Appeals affirmed. *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 894 F. 2d 696 (CA5 1990). The court rejected Chambers' argument that a federal court sitting in diversity must look to state law, not the court's inherent power, to assess attorney's fees as a sanction for bad-faith conduct in litigation. The court further found that neither 28 U. S. C. § 1927 nor Federal Rule of Civil Procedure 11 limits a court's inherent authority to sanction bad-faith conduct "when the party's conduct is not within the reach of the rule or the statute."[7] 894 F. 2d, at 702–703. Although observing that the inherent power "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function," *id.*, at 702, the court also concluded that the District Court did not abuse its discretion in awarding to NASCO the fees and litigation costs paid to its attorneys. Because of the importance of these issues, we granted certiorari, 498 U. S. 807 (1990).

II

Chambers maintains that 28 U. S. C. § 1927 and the various sanctioning provisions in the Federal Rules of Civil Procedure[8] reflect a legislative intent to displace the inherent

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[7] The court remanded for a reconsideration of the proper sanction for attorney McCabe. 894 F. 2d, at 708.

[8] A number of the Rules provide for the imposition of attorney's fees as a sanction. See Fed. Rules Civ. Proc. 11 (certification requirement for papers), 16(f) (pretrial conferences), 26(g) (certification requirement for discovery requests), 30(g) (oral depositions), 37 (sanctions for failure to cooperate with discovery), 56(g) (affidavits accompanying summary judg-

power. At least, he argues that they obviate or foreclose resort to the inherent power in this case. We agree with the Court of Appeals that neither proposition is persuasive.

A

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812); see also *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 764 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson* v. *Dunn*, 6 Wheat. 204, 227 (1821); see also *Ex parte Robinson*, 19 Wall. 505, 510 (1874). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962).

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See *Ex parte Burr*, 9 Wheat. 529, 531 (1824). While this power "ought to be exercised with great caution," it is nevertheless "incidental to all Courts." *Ibid.*

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ment motions). In some instances, the assessment of fees is one of a range of possible sanctions, see, *e. g.*, Fed. Rule Civ. Proc. 11, while in others, the court must award fees, see, *e. g.*, Fed. Rule Civ. Proc. 16(f). In each case, the fees that may be assessed are limited to those incurred as a result of the Rule violation. In the case of Rule 11, however, a violation could conceivably warrant an imposition of fees covering the entire litigation, if, for example, a complaint or answer was filed in violation of the Rule. The court generally may act *sua sponte* in imposing sanctions under the Rules.

In addition, it is firmly established that "[t]he power to punish for contempts is inherent in all courts." *Robinson*, *supra*, at 510. This power reaches both conduct before the court and that beyond the court's confines, for "[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 798 (1987) (citations omitted).

Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944); *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 580 (1946). This "historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas*, 322 U. S., at 245, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.*, at 246. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. *Universal Oil*, *supra*, at 580.

There are other facets to a federal court's inherent power. The court may bar from the courtroom a criminal defendant who disrupts a trial. *Illinois* v. *Allen*, 397 U. S. 337 (1970). It may dismiss an action on grounds of *forum non conveniens*, *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507–508 (1947); and it may act *sua sponte* to dismiss a suit for failure to prosecute, *Link*, *supra*, at 630–631.

Because of their very potency, inherent powers must be exercised with restraint and discretion. See *Roadway Express*, *supra*, at 764. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct

which abuses the judicial process. As we recognized in *Roadway Express*, outright dismissal of a lawsuit, which we had upheld in *Link*, is a particularly severe sanction, yet is within the court's discretion. 447 U. S., at 765. Consequently, the "less severe sanction" of an assessment of attorney's fees is undoubtedly within a court's inherent power as well. *Ibid.* See also *Hutto* v. *Finney*, 437 U. S. 678, 689, n. 14 (1978).

Indeed, "[t]here are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," *Roadway Express*, *supra*, at 765, even though the so-called "American Rule" prohibits fee shifting in most cases. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 259 (1975). As we explained in *Alyeska*, these exceptions fall into three categories.[9] The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, see *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 164 (1939), and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. *Alyeska*, 421 U. S., at 257–258. Second, a court may assess attorney's fees as a sanction for the "'willful disobedience of a court order.'" *Id.*, at 258 (quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967)). Thus, a court's discretion to determine "[t]he degree of punishment for contempt" permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 428 (1923).

Third, and most relevant here, a court may assess attorney's fees when a party has "'acted in bad faith, vexatiously,

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[9] See also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 561–562, and n. 6 (1986); *Summit Valley Industries, Inc.* v. *Carpenters*, 456 U. S. 717, 721 (1982); *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129–130 (1974).

wantonly, or for oppressive reasons.'" *Alyeska*, *supra*, at 258–259 (quoting *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129 (1974)). See also *Hall* v. *Cole*, 412 U. S. 1, 5 (1973); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 4 (1968) *(per curiam)*. In this regard, if a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled," it may assess attorney's fees against the responsible party, *Universal Oil*, *supra*, at 580, as it may when a party "shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order,"[10] *Hutto*, 437 U. S., at 689, n. 14. The imposition of sanctions in this instance transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Ibid.*

B

We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices. Even JUSTICE KENNEDY's dissent so

[10] In this regard, the bad-faith exception resembles the third prong of Rule 11's certification requirement, which mandates that a signer of a paper filed with the court warrant that the paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

concedes. See *post*, at 64. Second, while the narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders, many of the other mechanisms permit a court to impose attorney's fees as a sanction for conduct which merely fails to meet a reasonableness standard. Rule 11, for example, imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith.[11] See *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S. 533, 548–549 (1991).

It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for "[t]hese courts were created by act of Congress." *Robinson*, 19 Wall., at 511. Nevertheless, "we do not lightly assume that Congress has intended to depart from established principles" such as the scope of a court's inherent power. *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982); see also *Link*, 370 U. S., at 631–632. In *Alyeska* we determined that "Congress ha[d] not repudiated the judicially fashioned exceptions" to the American Rule, which were founded in the inherent power of the courts. 421 U. S., at 260. Nothing since then has changed that assessment,[12] and we have thus

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[11] Indeed, Rule 11 was amended in 1983 precisely because the subjective bad-faith standard was difficult to establish and courts were therefore reluctant to invoke it as a means of imposing sanctions. See Advisory Committee's Notes on 1983 Amendment to Rule 11, 28 U. S. C. App., pp. 575–576. Consequently, there is little risk that courts will invoke their inherent power "to chill the advocacy of litigants attempting to vindicate all other important federal rights." See *post*, at 68 (KENNEDY, J., dissenting). To the extent that such a risk does exist, it is no less present when a court invokes Rule 11. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 393 (1990).

[12] Chambers also asserts that all inherent powers are not created equal. Relying on *Eash* v. *Riggins Trucking Inc.*, 757 F. 2d 557, 562–563 (CA3 1985) (en banc), he suggests that inherent powers fall into three tiers: (1)

reaffirmed the scope and the existence of the exceptions since the most recent amendments to § 1927 and Rule 11, the other sanctioning mechanisms invoked by NASCO here. See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 561–562, and n. 6 (1986). As the Court of Appeals recognized, 894 F. 2d, at 702, the amendment to § 1927 allowing an assessment of fees against an attorney says nothing about a court's power to assess fees against a party. Likewise, the Advisory Committee's Notes on the 1983 Amendment to Rule 11, 28 U. S. C. App., p. 575, declare that the Rule "build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation," citing as support this Court's decisions in *Roadway Express* and *Hall*.[13] Thus, as the Court of Appeals for the Ninth Circuit has recognized, Rule 11 "does not repeal or modify existing authority of federal courts to deal with abuses . . . under the court's

irreducible powers derived from Article III, which exist despite contrary legislative direction; (2) essential powers that arise from the nature of the court, which can be legislatively regulated but not abrogated; and (3) powers that are necessary only in the sense of being useful, which exist absent legislation to the contrary. Brief for Petitioner 17. Chambers acknowledges that this Court has never so classified the inherent powers, and we have no need to do so now. Even assuming, *arguendo*, that the power to shift fees falls into the bottom tier of this alleged hierarchy of inherent powers, Chambers' argument is unavailing, because we find no legislative intent to limit the scope of this power.

[13] The Advisory Committee's Notes on the 1983 Amendments to other Rules reflect a similar intent to preserve the scope of the inherent power. While the Notes to Rule 16, 28 U. S. C. App., p. 591, point out that the sanctioning provisions are designed "to obviate dependence upon Rule 41(b) or the court's inherent power," there is no indication of an intent to displace the inherent power, but rather simply to provide courts with an additional tool by which to control the judicial process. The Notes to Rule 26(g), 28 U. S. C. App., p. 622, point out that the rule "makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U. S. C. § 1927, and the court's inherent power." (Citations omitted.)

inherent power." *Zaldivar* v. *Los Angeles*, 780 F. 2d 823, 830 (1986).

The Court's prior cases have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct. In *Link*, it was recognized that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the language of Federal Rule of Civil Procedure 41(b) appeared to require a motion from a party:

> "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition." 370 U. S., at 630–632 (footnotes omitted).

In *Roadway Express*, a party failed to comply with discovery orders and a court order concerning the schedule for filing briefs. 447 U. S., at 755. After determining that § 1927, as it then existed, would not allow for the assessment of attorney's fees, we remanded the case for a consideration of sanctions under *both* Federal Rule of Civil Procedure 37 *and* the court's inherent power, while recognizing that invocation of the inherent power would require a finding of bad faith.[14] *Id.*, at 767.

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[14] The decision in *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U. S. 197 (1958), is not to the

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, see *Roadway Express*, *supra*, at 767. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.

Like the Court of Appeals, we find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," 124 F. R. D., at 138, and that some of the other conduct might have been reached through other Rules. Much of the bad-faith conduct by Chambers, however, was

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contrary. There it was held that the Court of Appeals had erred in relying on the District Court's inherent power and Rule 41(b), rather than Federal Rule of Civil Procedure 37(b)(2)(iii), in dismissing a complaint for a plaintiff's failure to comply with a discovery order. Because Rule 37 dealt specifically with discovery sanctions, *id.*, at 207, there was "no need" to resort to Rule 41(b), which pertains to trials, or to the court's inherent power, *ibid.* Moreover, because individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies. Cf. *Zaldivar* v. *Los Angeles*, 780 F. 2d 823, 830 (CA9 1986).

beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves. See, *e. g.*, Advisory Committee's Notes on 1983 Amendment to Rule 11, 28 U. S. C. App., pp. 575–576.

We likewise do not find that the District Court's reliance on the inherent power thwarted the purposes of the other sanctioning mechanisms. Although JUSTICE KENNEDY's dissent makes much of the fact that Rule 11 and Rule 26(g) "are cast in mandatory terms," *post*, at 66, the mandate of these provisions extends only to *whether* a court must impose sanctions, not to *which* sanction it must impose. Indeed, the language of both Rules requires only that a court impose "an appropriate sanction." Thus, this case is distinguishable from *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), in which this Court held that a district court could not rely on its supervisory power as a means of circumventing the clear mandate of a procedural rule. *Id.*, at 254–255.

III

Chambers asserts that even if federal courts can use their inherent power to assess attorney's fees as a sanction in some cases, they are not free to do so when they sit in diversity, unless the applicable state law recognizes the "bad-faith" exception to the general rule against fee shifting. He relies on footnote 31 in *Alyeska*, in which we stated with regard to the exceptions to the American Rule that "[a] very different situ-

ation is presented when a federal court sits in a diversity case. '[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' 6 J. Moore, Federal Practice ¶ 54.77[2], pp. 1712–1713 (2d ed. 1974) (footnotes omitted)." 421 U. S., at 259, n. 31.

We agree with NASCO that Chambers has misinterpreted footnote 31. The limitation on a court's inherent power described there applies only to fee-shifting rules that embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees. That was precisely the issue in *Sioux County* v. *National Surety Co.*, 276 U. S. 238 (1928), the only case cited in footnote 31. There, a state statute mandated that in actions to enforce an insurance policy, the court was to award the plaintiff a reasonable attorney's fee. See *id.*, at 242, and n. 2. In enforcing the statute, the Court treated the provision as part of a statutory liability which created a substantive right. *Id.*, at 241–242. Indeed, *Alyeska* itself concerned the substantive nature of the public policy choices involved in deciding whether vindication of the rights afforded by a particular statute is important enough to warrant the award of fees. See 421 U. S., at 260–263.

Only when there is a conflict between state and federal substantive law are the concerns of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), at issue. As we explained in *Hanna* v. *Plumer*, 380 U. S. 460 (1965), the "outcome determinative" test of *Erie* and *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), "cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U. S., at 468. Despite Chambers' protestations to the contrary, neither of these twin aims is implicated by the assessment of attorney's fees as a sanction for bad-faith conduct before the

court which involved disobedience of the court's orders and the attempt to defraud the court itself. In our recent decision in *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S., at 553, we stated, "Rule 11 sanctions do not constitute the kind of fee shifting at issue in *Alyeska* [because they] are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded." Likewise, the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation. Consequently, there is no risk that the exception will lead to forum-shopping. Nor is it inequitable to apply the exception to citizens and noncitizens alike, when the party, by controlling his or her conduct in litigation, has the power to determine whether sanctions will be assessed. As the Court of Appeals expressed it: "*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so." 894 F. 2d, at 706.

As Chambers has recognized, see Brief for Petitioner 15, in the case of the bad-faith exception to the American Rule, "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall*, 412 U. S., at 4–5. Cf. *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 126 (1989). "[T]he award of attorney's fees for bad faith serve[s] the same purpose as a remedial fine imposed for civil contempt," because "[i]t vindicate[s] the District Court's authority over a recalcitrant litigant." *Hutto*, 437 U. S., at 691. "That the award ha[s] a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compen-

sates a private party for the consequences of a contemnor's disobedience."[15] *Id.*, at 691, n. 17.

Chambers argues that because the primary purpose of the sanction is punitive, assessing attorney's fees violates the State's prohibition on punitive damages. Under Louisiana law, there can be no punitive damages for breach of contract, even when a party has acted in bad faith in breaching the agreement. *Lancaster* v. *Petroleum Corp. of Delaware*, 491 So. 2d 768, 779 (La. App. 1986). Cf. La. Civ. Code Ann., Art. 1995 (West 1987). Indeed, "as a general rule attorney's fees are not allowed a successful litigant in Louisiana except where authorized by statute or by contract." *Rutherford* v. *Impson*, 366 So. 2d 944, 947 (La. App. 1978). It is clear, though, that this general rule focuses on the award of attorney's fees because of a party's success on the underlying claim. Thus, in *Frank L. Beier Radio, Inc.* v. *Black Gold Marine, Inc.*, 449 So. 2d 1014 (La. 1984), the state court considered the scope of a statute which permitted an award of attorney's fees in a suit seeking to collect on an open account. *Id.*, at 1015. This substantive state policy is not implicated here, where sanctions were imposed for conduct during the litigation.

Here, the District Court did not attempt to sanction petitioner for breach of contract,[16] but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation.[17] See 124 F. R. D., at 123,

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[15] Consequently, Chambers' reformulated argument in his reply brief that the primary purpose of a fee shift under the bad-faith exception "has always been compensatory," Reply Brief for Petitioner 15–16, fails utterly.

[16] We therefore express no opinion as to whether the District Court would have had the inherent power to sanction Chambers for conduct relating to the underlying breach of contract, or whether such sanctions might implicate the concerns of *Erie*.

[17] Contrary to Chambers' assertion, the District Court did not sanction him for failing to file the requisite papers with the FCC in September 1983, although the District Court did find that this conduct was a deliberate

143. We agree with the Court of Appeals that "[w]e do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie*, *Guaranty Trust Co.*, and *Hanna*," for "[f]ee-shifting here is not a matter of substantive remedy, but of vindicating judicial authority." 894 F. 2d, at 705.

IV

We review a court's imposition of sanctions under its inherent power for abuse of discretion. *Link*, 370 U. S., at 633; see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 399–405 (1990) (Rule 11). Based on the circumstances of this case, we find that the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees.

Relying on cases imposing sanctions under Rule 11,[18] Chambers proffers five criteria for imposing attorney's fees as a sanction under a court's inherent power, and argues that the District Court acted improperly with regard to each of

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violation of the agreement and was done "in absolute bad faith," 124 F. R. D., at 125. As the court noted, "the allegedly sanctionable acts were committed in the conduct and trial of the very proceeding in which sanctions [were] sought," *id.*, at 141, n. 11, and thus the sanctions imposed "appl[ied] only to sanctionable acts which occurred in connection with the proceedings in the trial Court," *id.*, at 143. Although the fraudulent transfer of assets took place before the suit was filed, it occurred after Chambers was given notice, pursuant to court rule, of the pending suit. Consequently, the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself. Indeed, the District Court made clear that it was policing abuse of its own process when it imposed sanctions "for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit." *Id.*, at 123.

[18] See, *e. g.*, *In re Kunstler*, 914 F. 2d 505 (CA4 1990), cert. denied, 499 U. S. 969 (1991); *White* v. *General Motors Corp.*, 908 F. 2d 675 (CA10 1990); *Thomas* v. *Capital Security Services, Inc.*, 836 F. 2d 866 (CA5 1988) (en banc).

them. First, he asserts that sanctions must be timely in order to have the desired deterrent effect, and that the post-judgment sanction imposed here fails to achieve that aim. As NASCO points out, however, we have made clear that, even under Rule 11, sanctions may be imposed years after a judgment on the merits.[19] *Id.*, at 395–396. Interrupting the proceedings on the merits to conduct sanctions hearings may serve only to reward a party seeking delay. More importantly, while the sanction was not assessed until the conclusion of the litigation, Chambers received repeated timely warnings both from NASCO and the court that his conduct was sanctionable. Cf. *Thomas* v. *Capital Security Services, Inc.*, 836 F. 2d 866, 879–881 (CA5 1988) (en banc). Consequently, the District Court's reliance on the inherent power did not represent an end run around the notice requirements of Rule 11. The fact that Chambers obstinately refused to be deterred does not render the District Court's action an abuse of discretion.

Second, Chambers claims that the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong. As NASCO points out, however, the District Court concluded that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated.[20] Indeed, the court found Chambers' actions were

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[19] Cf. Advisory Committee Notes on 1983 Amendment to Rule 11, 28 U. S. C. App., p. 576 ("The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter").

[20] In particular, Chambers challenges the assessment of attorney's fees in connection with NASCO's claim for delay damages and with the closing of the sale. As NASCO points out, however, Chambers' bad-faith conduct in the course of the litigation caused the delay for which damages were

"part of [a] sordid scheme of deliberate misuse of the judicial process" designed "to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." 124 F. R. D., at 128. It was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees. Cf. *Toledo Scale*, 261 U. S., at 428.

Third, Chambers maintains that the District Court abused its discretion by failing to require NASCO to mitigate its expenses. He asserts that had NASCO sought summary disposition of the case, the litigation could have been concluded much sooner. But, as NASCO notes, Chambers himself made a swift conclusion to the litigation by means of summary judgment impossible by continuing to assert that material factual disputes existed.

Fourth, Chambers challenges the District Court's imposition of sanctions for conduct before other tribunals, including the FCC, the Court of Appeals, and this Court, asserting that a court may sanction only conduct occurring in its presence. Our cases are to the contrary, however. As long as a party receives an appropriate hearing, as did Chambers, see 124 F. R. D., at 141, n. 11, the party may be sanctioned for abuses of process occurring beyond the courtroom, such as disobeying the court's orders. See *Young*, 481 U. S., at 798; *Toledo Scale*, *supra*, at 426–428. Here, for example, Chambers' attempt to gain the FCC's permission to build a new transmission tower was in direct contravention of the District Court's orders to maintain the status quo pending the outcome of the litigation and was therefore within the scope of the District Court's sanctioning power.

Finally, Chambers claims the award is not "personalized," because the District Court failed to conduct any inquiry into whether he was personally responsible for the challenged conduct. This assertion is flatly contradicted by the District

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sought and greatly complicated the closing of the sale, through the cloud on the title caused by the fraudulent transfer.

Court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue. Indeed, the court specifically held that "the extraordinary amount of costs and expenses expended in this proceeding were caused not by lack of diligence or any delays in the trial of this matter by NASCO, NASCO's counsel or the Court, but solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers" and the others. 124 F. R. D., at 136. The Court of Appeals saw no reason to disturb this finding. 894 F. 2d, at 706. Neither do we.

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit is

Affirmed.

JUSTICE SCALIA, dissenting.

I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to "[t]he judicial Power," U. S. Const., Art. III, § 1, that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings.

> "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute . . . ." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812).

I think some explanation might be useful regarding the "bad-faith" limitation that the Court alludes to today, see *ante*, at 47. Since necessity does not depend upon a liti-

gant's state of mind, the inherent sanctioning power must extend to situations involving less than bad faith. For example, a court has the power to dismiss when counsel fails to appear for trial, even if this is a consequence of negligence rather than bad faith.

> "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962).

However, a "bad-faith" limitation upon the particular sanction of attorney's fees derives from our jurisprudence regarding the so-called American Rule, which provides that the prevailing party must bear his own attorney's fees and cannot have them assessed against the loser. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). That rule, "deeply rooted in our history and in congressional policy," *id.*, at 271, prevents a court (without statutory authorization) from engaging in what might be termed *substantive* fee shifting, that is, fee shifting as part of the merits award. It does not in principle bar fee shifting as a sanction for procedural abuse, see *id.*, at 258–259. We have held, however—in my view as a means of preventing erosion or evasion of the American Rule—that even fee shifting as a sanction can only be imposed for litigation conduct characterized by bad faith. See *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 766 (1980). But that in no way means that *all* sanctions imposed under the courts' inherent authority require a finding of bad faith. They do not. See *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176 (1884) (dismissal appropriate for unexcused delay in prosecution); cf. *Link*, *supra*.

Just as Congress may to some degree specify the manner in which the inherent or constitutionally assigned powers of

the President will be exercised, so long as the effectiveness of those powers is not impaired, cf. *Myers* v. *United States*, 272 U. S. 52, 128 (1926), so also Congress may prescribe the means by which the courts may protect the integrity of their proceedings. A court must use the prescribed means unless for some reason they are inadequate. In the present case they undoubtedly were. JUSTICE KENNEDY concedes that some of the impairments of the District Court's proceedings in the present case were not sanctionable under the Federal Rules. I have no doubt of a court's authority to go beyond the Rules in such circumstances. And I agree with the Court that an overall sanction resting at least in substantial portion upon the court's inherent power need not be broken down into its component parts, with the actions sustainable under the Rules separately computed. I do not read the Rules at issue here to require that, and it is unreasonable to import such needless complication by implication.

I disagree, however, with the Court's statement that a court's inherent power reaches conduct "beyond the court's confines" that does not "'interfer[e] with the conduct of trial,'" *ante*, at 44 (quoting *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 798 (1987)). See *id.*, at 819–822 (SCALIA, J., concurring in judgment); *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 264 (1988) (SCALIA, J., concurring). I emphatically agree with JUSTICE KENNEDY, therefore, that the District Court here had no power to impose any sanctions for petitioner's flagrant, bad-faith breach of contract; and I agree with him that it appears to have done so. For that reason, I dissent.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SOUTER join, dissenting.

Today's decision effects a vast expansion of the power of federal courts, unauthorized by Rule or statute. I have no doubt petitioner engaged in sanctionable conduct that warrants severe corrective measures. But our outrage at his

conduct should not obscure the boundaries of settled legal categories.

With all respect, I submit the Court commits two fundamental errors. First, it permits the exercise of inherent sanctioning powers without prior recourse to controlling Rules and statutes, thereby arrogating to federal courts Congress' power to regulate fees and costs. Second, the Court upholds the wholesale shift of respondent's attorney's fees to petitioner, even though the District Court opinion reveals that petitioner was sanctioned at least in part for his so-called bad-faith breach of contract. The extension of inherent authority to sanction a party's prelitigation conduct subverts the American Rule and turns the *Erie* doctrine upside down by punishing petitioner's primary conduct contrary to Louisiana law. Because I believe the proper exercise of inherent powers requires exhaustion of express sanctioning provisions and much greater caution in their application to redress prelitigation conduct, I dissent.

I

The Court's first error lies in its failure to require reliance, when possible, on the panoply of express sanctioning provisions provided by Congress.

A

The American Rule prohibits federal courts from awarding attorney's fees in the absence of a statute or contract providing for a fee award. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 258–259 (1975). The Rule recognizes that Congress defines the procedural and remedial powers of federal courts, *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 9–10 (1941); *McIntire* v. *Wood*, 7 Cranch 504, 505–506 (1813), and controls the costs, sanctions, and fines available there, *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the legislature, not the courts"); *Alyeska Pipeline Co.*, *supra*, at 262 ("[T]he circum-

stances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine").

By direct action and delegation, Congress has exercised this constitutional prerogative to provide district courts with a comprehensive arsenal of Federal Rules and statutes to protect themselves from abuse. A district court can punish contempt of its authority, including disobedience of its process, by fine or imprisonment, 18 U. S. C. § 401; award costs, expenses, and attorney's fees against attorneys who multiply proceedings vexatiously, 28 U. S. C. § 1927; sanction a party and/or the party's attorney for filing groundless pleadings, motions, or other papers, Fed. Rule Civ. Proc. 11; sanction a party and/or his attorney for failure to abide by a pretrial order, Fed. Rule Civ. Proc. 16(f); sanction a party and/or his attorney for baseless discovery requests or objections, Fed. Rule Civ. Proc. 26(g); award expenses caused by a failure to attend a deposition or to serve a subpoena on a party to be deposed, Fed. Rule Civ. Proc. 30(g); award expenses when a party fails to respond to discovery requests or fails to participate in the framing of a discovery plan, Fed. Rules Civ. Proc. 37(d) and (g); dismiss an action or claim of a party that fails to prosecute, to comply with the Federal Rules, or to obey an order of the court, Fed. Rule Civ. Proc. 41(b); punish any person who fails to obey a subpoena, Fed. Rule Civ. Proc. 45(f); award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay, Fed. Rule Civ. Proc. 56(g); and make rules governing local practice that are not inconsistent with the Federal Rules, Fed. Rule Civ. Proc. 81. See also 28 U. S. C. § 1912 (power to award just damages and costs on affirmance); Fed. Rule App. Proc. 38 (power to award damages and costs for frivolous appeal).

The Court holds nonetheless that a federal court may ignore these provisions and exercise inherent power to sanction bad-faith misconduct "even if procedural rules exist which

sanction the same conduct." *Ante*, at 49. The Court describes the relation between express sanctioning provisions and inherent power to shift fees as a sanction for bad-faith conduct in a number of ways. At one point it states that where "neither the statute nor the Rules are up to the task [*i. e.*, cover all the sanctionable conduct], the court may safely rely on its inherent power." *Ante*, at 50. At another it says that courts may place exclusive reliance on inherent authority whenever "conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." *Ante*, at 51. While the details of the Court's rule remain obscure, its general approach is clear: When express Rules and statutes provided by Congress do not reach the entirety of a litigant's bad-faith conduct, including conduct occurring before litigation commenced, a district court may disregard the requirements of otherwise applicable Rules and statutes and instead exercise inherent power to impose sanctions. The only limitation on this sanctioning authority appears to be a finding at some point of "bad faith," a standard the Court fails to define.

This explanation of the permitted sphere of inherent powers to shift fees as a sanction for bad-faith litigation conduct is as illegitimate as it is unprecedented. The American Rule recognizes that the Legislature, not the Judiciary, possesses constitutional responsibility for defining sanctions and fees; the bad-faith exception to the Rule allows courts to assess fees not provided for by Congress "in narrowly defined circumstances." *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 765 (1980). By allowing courts to ignore express Rules and statutes on point, however, the Court treats inherent powers as the norm and textual bases of authority as the exception. And although the Court recognizes that Congress in theory may channel inherent powers through passage of sanctioning Rules, it relies on *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305 (1982), a decision that has nothing to do with

inherent authority, to create a powerful presumption against congressional control of judicial sanctions. *Ante*, at 47.

The Court has the presumption backwards. Inherent powers are the exception, not the rule, and their assertion requires special justification in each case. Like all applications of inherent power, the authority to sanction bad-faith litigation practices can be exercised only when necessary to preserve the authority of the court. See *Roadway Express, Inc.* v. *Piper*, *supra*, at 764 (inherent powers "are those which 'are necessary to the exercise of all others'"); *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 819–820 (1987) (SCALIA, J., concurring in judgment) (inherent powers only those "necessary to permit the courts to function").

The necessity limitation, which the Court brushes aside almost without mention, *ante*, at 43, prescribes the rule for the correct application of inherent powers. Although this case does not require articulation of a comprehensive definition of the term "necessary," at the very least a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end. Consistent with our unaltered admonition that inherent powers must be exercised "with great caution," *Ex parte Burr*, 9 Wheat. 529, 531 (1824), the necessity predicate limits the exercise of inherent powers to those exceptional instances in which congressionally authorized powers fail to protect the processes of the court. Inherent powers can be exercised only when necessary, and there is no necessity if a Rule or statute provides a basis for sanctions. It follows that a district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text-based authority applies.

Despite the Court's suggestion to the contrary, *ante*, at 48–49, our cases recognize that Rules and statutes limit the exercise of inherent authority. In *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rog-*

ers, 357 U. S. 197 (1958), we rejected the Court of Appeals' reliance on inherent powers to uphold a dismissal of a complaint for failure to comply with a production order. Noting that "[r]eliance upon . . . 'inherent power' can only obscure analysis of the problem," we held that "whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37." *Id.*, at 207. Similarly, in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254 (1988), we held that a federal court could not invoke its inherent supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). And *Ex parte Robinson*, 19 Wall. 505 (1874), the very case the Court cites for the proposition that "'[t]he power to punish for contempts is inherent in all courts,'" *ante*, at 44, held that Congress had defined and limited this inherent power through enactment of the contempt statute. "The enactment is a limitation upon the manner in which the [contempt] power shall be exercised." 19 Wall., at 512.

The Court ignores these rulings and relies instead on two decisions which "indicat[e] that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Ante*, at 49. The "indications" the Court discerns in these decisions do not withstand scrutiny. In *Roadway Express, Inc.* v. *Piper*, *supra*, we held that the costs recoverable under a prior version of 28 U. S. C. § 1927 for discovery abuse did not include attorney's fees. In the remand instruction, the Court mentioned that the District Court might consider awarding attorney's fees under either Federal Rule of Civil Procedure 37 or its inherent authority to sanction bad-faith litigation practices. 447 U. S., at 767–768. The decision did not discuss the relation between Rule 37 and the inherent power of federal courts, and certainly did not suggest that federal courts could rely on inherent powers to the exclusion of a Federal Rule on point.

The Court also misreads *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962). *Link* held that a Federal District Court possessed inherent power to dismiss a case *sua sponte* for failure to prosecute. The majority suggests that this holding contravened a prior version of Federal Rule of Civil Procedure 41(b), which the Court today states "appeared to *require* a motion from a party," *ante*, at 49 (emphasis added). Contrary to the Court's characterization, the holding in *Link* turned on a determination that Rule 41(b) contained "*permissive* language . . . which merely authorizes a motion by the defendant," 370 U. S., at 630 (emphasis added). *Link* reasoned that "[n]either the permissive language of the Rule . . . nor its policy" meant that the Rule "abrogate[d]" the inherent power of federal courts to dismiss *sua sponte*. The permissive language at issue in *Link* distinguishes it from the present context, because some sanctioning provisions, such as Rules 11 and 26(g), are cast in mandatory terms.

In addition to dismissing some of our precedents and misreading others, the Court ignores the commands of the Federal Rules of Civil Procedure, which support the conclusion that a court should rely on rules, and not inherent powers, whenever possible. Like the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, *supra*, at 255. See also Fed. Rule Civ. Proc. 1 (Federal Rules "*govern* the procedure in the United States district courts in *all* suits of a civil nature") (emphasis added). Two of the most prominent sanctioning provisions, Rules 11 and 26(g), mandate the imposition of sanctions when litigants violate the Rules' certification standards. See Fed. Rule Civ. Proc. 11 (court "shall impose . . . an appropriate sanction" for violation of certification standard); Fed. Rule Civ. Proc. 26(g) (same); see also *Business Guides, Inc.* v. *Chromatic Communications Enter-*

prises, Inc., 498 U. S. 533, 543 (1991) (Rule 11 "requires that sanctions be imposed where a signature is present but fails to satisfy the certification standard").

The Rules themselves thus reject the contention that they may be discarded in a court's discretion. Disregard of applicable Rules also circumvents the rulemaking procedures in 28 U. S. C. § 2071 *et seq.*, which Congress designed to assure that procedural innovations like those announced today "shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner* v. *Atlass*, 363 U. S. 641, 650 (1960).

B

Upon a finding of bad faith, courts may now ignore any and all textual limitations on sanctioning power. By inviting district courts to rely on inherent authority as a substitute for attention to the careful distinctions contained in the Rules and statutes, today's decision will render these sources of authority superfluous in many instances. A number of pernicious practical effects will follow.

The Federal Rules establish explicit standards for, and explicit checks against, the exercise of judicial authority. Rule 11 provides a useful illustration. It requires a district court to impose reasonable sanctions, including attorney's fees, when a party or attorney violates the certification standards that attach to the signing of certain legal papers. A district court must (rather than may) issue sanctions under Rule 11 when particular individuals (signers) file certain types (groundless, unwarranted, vexatious) of documents (pleadings, motions and papers). Rule 11's certification requirements apply to all signers of documents, including represented parties, see *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, *supra*, but law firms are not responsible for the signatures of their attorneys, see *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S.

120, 125–127 (1989), and the Rule does not apply to papers filed in fora other than district courts, see *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405–409 (1990). These definite standards give litigants notice of proscribed conduct and make possible meaningful review for misuse of discretion—review which focuses on the misapplication of legal standards. See *id.*, at 402 (misuse of discretion standard does "not preclude the appellate court's correction of a district court's legal errors").

By contrast, courts apply inherent powers without specific definitional or procedural limits. True, if a district court wishes to shift attorney's fees as a sanction, it must make a finding of bad faith to circumvent the American Rule. But today's decision demonstrates how little guidance or limitation the undefined bad-faith predicate provides. The Court states without elaboration that courts must "comply with the mandates of due process . . . in determining that the requisite bad faith exists," *ante*, at 50, but the Court's bad-faith standard, at least without adequate definition, thwarts the first requirement of due process, namely, that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). This standardless exercise of judicial power may appear innocuous in this litigation between commercial actors. But the same unchecked power also can be applied to chill the advocacy of litigants attempting to vindicate all other important federal rights.

In addition, the scope of sanctionable conduct under the bad-faith rule appears unlimited. As the Court boasts, "whereas each of the other mechanisms [in Rules and statutes] reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses." *Ante*, at 46. By allowing exclusive resort to inherent authority whenever "conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address," *ante*, at 51, the Court encourages all courts

in the federal system to find bad-faith misconduct in order to eliminate the need to rely on specific textual provisions. This will ensure the uncertain development of the meaning and scope of these express sanctioning provisions by encouraging their disuse, and will defeat, at least in the area of sanctions, Congress' central goal in enacting the Federal Rules—"'uniformity in the federal courts.'" *Hanna* v. *Plumer*, 380 U. S. 460, 472 (1965). Finally, as Part IV of the Court's opinion demonstrates, the lack of any legal requirement other than the talismanic recitation of the phrase "bad faith" will foreclose meaningful review of sanctions based on inherent authority. See *Cooter & Gell* v. *Hartmarx Corp.*, *supra*, at 402.

Despite these deficiencies, the Court insists that concern about collateral litigation requires courts to place exclusive reliance on inherent authority in cases, like this one, which involve conduct sanctionable under both express provisions and inherent authority:

> "In circumstances such as these in which all of a litigant's conduct is deemed santionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." *Ante*, at 51.

We are bound, however, by the Rules themselves, not their "aim," and the Rules require that they be applied, in accordance with their terms, to much of the conduct in this case. We should not let policy concerns about the litigation effects of following the Rules distort their clear commands.

Nothing in the foregoing discussion suggests that the fee-shifting and sanctioning provisions in the Federal Rules and Title 28 eliminate the inherent power to impose sanctions for certain conduct. Limitations on a power do not constitute its abrogation. Cases can arise in which a federal court must

act to preserve its authority in a manner not provided for by the Federal Rules or Title 28. But as the number and scope of Rules and statutes governing litigation misconduct increase, the necessity to resort to inherent authority—a predicate to its proper application—lessens. Indeed, it is difficult to imagine a case in which a court can, as the District Court did here, rely on inherent authority as the exclusive basis for sanctions.

C

The District Court's own findings concerning abuse of its processes demonstrate that the sanctionable conduct in this case implicated a number of Rules and statutes upon which it should have relied. Rule 11 is the principal provision on point. The District Court found that petitioner and his counsel filed a number of "frivolous pleadings" (including "baseless, affirmative defenses and counterclaims") that contained "deliberate untruths and fabrications." *NASCO, Inc.* v. *Calcasieu Television & Radio, Inc.*, 124 F. R. D. 120, 127–128, 135 (WD La. 1989). Rule 11 sanctions extend to "the person who signed [a paper], a represented party, or both." The court thus had a nondefeasible duty to impose sanctions under Rule 11.

The Court concedes that Rule 11 applied to some of the conduct in this case, *ante*, at 50, and even hints that the Rule might have sufficed as a basis for all of the sanctions imposed, *ante*, at 42, n. 8. It fails to explain, however, why the District Court had the discretion to ignore Rule 11's mandatory language and not impose sanctions under the Rule against Chambers. Nor does the Court inform us why Chambers' attorneys were not sanctioned under Rule 11. Although the District Court referred to Chambers as the "strategist" for the abusive conduct, it made plain that petitioner's attorneys as well as petitioner were responsible for the tactics. For example, the District Court stated:

> "[Petitioner's] attorneys, without any investigation whatsoever, filed [the baseless charges and counter-

> claims]. We find . . . that these attorneys knew, at the time that they were filed, that they were false." 124 F. R. D., at 128.

The court further stressed that "Chambers, through his attorneys, filed answers and counterclaims . . . which both Chambers and his attorneys knew were false at the time they were filed." *Id.*, at 143. In light of Rule 11's mandatory language, the District Court had a duty to impose at least some sanctions under Rule 11 against Chambers' attorneys.

The District Court should have relied as well upon other sources of authority to impose sanctions. The court found that Chambers and his attorneys requested "[a]bsolutely needless depositions" as well as "continuances of trial dates, extensions of deadlines and deferments of scheduled discovery" that "were simply part of the sordid scheme of deliberate misuse of the judicial process . . . to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.*, at 128. The intentional pretrial delays could have been sanctioned under Federal Rule of Civil Procedure 16(f), which enables courts to impose sanctions, including attorney's fees, when a party or attorney "fails to participate in good faith" in certain pretrial proceedings; the multiple discovery abuses should have been redressed by "an appropriate sanction, . . . including a reasonable attorney's fee," under Federal Rule of Civil Procedure 26(g). The District Court also could have sanctioned Chambers and his attorneys for the various bad-faith affidavits they presented in their summary judgment motions, see 124 F. R. D., at 128, 135, under Federal Rule of Civil Procedure 56(g), a Rule that permits the award of expenses and attorney's fees and the additional sanction of contempt. In addition, the District Court could have relied to a much greater extent on 18 U. S. C. § 401 to punish the "contempt of its authority" and "[d]isobedience . . . to its . . . process" that petitioner and his counsel displayed throughout the proceedings.

Finally, the District Court was too quick to dismiss reliance on 28 U. S. C. § 1927, which allows it to award costs and attorney's fees against an "attorney . . . who . . . multiplies the proceedings in any case unreasonably and vexatiously." The District Court refused to apply the provision because it did not reach petitioner's conduct as a nonattorney. 124 F. R. D., at 138–139. While the District Court has discretion not to apply § 1927, it cannot disregard the statute in the face of attorney misconduct covered by that provision to rely instead on inherent powers which by definition can be invoked only when necessary.

II

When a District Court imposes sanctions so immense as here under a power so amorphous as inherent authority, it must ensure that its order is confined to conduct under its own authority and jurisdiction to regulate. The District Court failed to discharge this obligation, for it allowed sanctions to be awarded for petitioner's prelitigation breach of contract. The majority, perhaps wary of the District Court's authority to extend its inherent power to sanction prelitigation conduct, insists that "the District Court did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation." *Ante*, at 54 (footnote omitted). Based on this premise, the Court appears to disclaim that its holding reaches prelitigation conduct. *Ante*, at 54, and nn. 16–17. This does not make the opinion on this point correct, of course, for the District Court's opinion, in my view, sanctioned petitioner's prelitigation conduct in express terms. Because I disagree with the Court's characterization of the District Court opinion, and because I believe the Court's casual analysis of inherent authority portends a dangerous extension of that authority to prelitigation conduct, I explain why inherent

authority should not be so extended and why the District Court's order should be reversed.

The District Court's own candid and extensive opinion reveals that the bad faith for which petitioner was sanctioned extended beyond the litigation tactics and comprised as well what the District Court considered to be bad faith in refusing to perform the underlying contract three weeks before the lawsuit began. The court made explicit reference, for instance, to "this massive and absolutely unnecessary lawsuit forced on NASCO by Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract." 124 F. R. D., at 136. See also *id.*, at 143 ("Chambers arbitrarily and without legal cause refused to perform, forcing NASCO to bring its suit for specific performance"); *ibid.* ("Chambers, knowing that NASCO had a good and valid contract, hired Gray to find a defense and arbitrarily refused to perform, thereby forcing NASCO to bring its suit for specific performance and injunctive relief"); *id.*, at 125 (petitioner's "unjustified and arbitrary refusal to file" the FCC application "was in absolute bad faith"). The District Court makes the open and express concession that it is sanctioning petitioner for his breach of contract:

> "[T]he balance of . . . fees and expenses included in the sanctions, would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring this suit. There is absolutely no reason why Chambers should not reimburse in full all attorney's fees and expenses that NASCO, by Chambers' action, was forced to pay." *Id.*, at 143.

The trial court also explained that "[t]he attorney's fees and expenses charged to NASCO by its attorneys . . . *flowed from and were a direct result of this suit.* We shall include them in the attorney's fees sanctions." *Id.*, at 142 (emphasis added).

Despite the Court's equivocation on the subject, *ante*, at 54, n. 16, it is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A court's inherent authority extends only to remedy abuses of the judicial process. By contrast, awarding damages for a violation of a legal norm, here the binding obligation of a legal contract, is a matter of substantive law, see *Marek* v. *Chesny*, 473 U. S. 1, 35 (1985) ("right to attorney's fees is 'substantive' under any reasonable definition of that term"); see also *Alyeska*, 421 U. S., at 260–261, and n. 33, which must be defined either by Congress (in cases involving federal law) or by the States (in diversity cases).

The American Rule recognizes these principles. It bars a federal court from shifting fees as a matter of substantive policy, but its bad-faith exception permits fee shifting as a sanction to the extent necessary to protect the judicial process. The Rule protects each person's right to go to federal court to define and to vindicate substantive rights. "[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967). When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

By exercising inherent power to sanction prelitigation conduct, the District Court exercised authority where Congress gave it none. The circumstance that this exercise of power occurred in a diversity case compounds the error. When a federal court sits in diversity jurisdiction, it lacks constitutional authority to fashion rules of decision governing primary contractual relations. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938); *Hanna* v. *Plumer*, 380 U. S., at 471–472. See generally Ely, The Irrepressible Myth of *Erie*,

87 Harv. L. Rev. 693, 702–706 (1974). The *Erie* principle recognizes that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State." 304 U. S., at 78. The inherent power exercised here violates the fundamental tenet of federalism announced in *Erie* by regulating primary behavior that the Constitution leaves to the exclusive province of States.

The full effect of the District Court's encroachment on state prerogatives can be appreciated by recalling that the rationale for the bad-faith exception is punishment. *Hall* v. *Cole*, 412 U. S. 1, 5 (1973). To the extent that the District Court imposed sanctions by reason of the so-called bad-faith breach of contract, its decree is an award of punitive damages for the breach. Louisiana prohibits punitive damages "unless expressly authorized by statute," *International Harvester Credit Corp.* v. *Seale*, 518 So. 2d 1039, 1041 (La. 1988); and no Louisiana statute authorizes attorney's fees for breach of contract as a part of damages in an ordinary case, *Ogea* v. *Loffland Brothers Co.*, 622 F. 2d 186, 190 (CA5 1980); *Rutherford* v. *Impson*, 366 So. 2d 944, 947 (La. App. 1978). One rationale for Louisiana's policy is its determination that "an award of compensatory damages will serve the same deterrent purpose as an award of punitive damages." *Ricard* v. *State*, 390 So. 2d 882, 886 (La. 1980). If respondent had brought this suit in state court it would not have recovered extra damages for breach of contract by reason of the so-called willful character of the breach. Respondent's decision to bring this suit in federal rather than state court resulted in a significant expansion of the substantive scope of its remedy. This is the result prohibited by *Erie* and the principles that flow from it.

As the Court notes, there are some passages in the District Court opinion suggesting its sanctions were confined to litigation conduct. See *ante*, at 55, n. 17. ("[T]he sanctions imposed 'appl[ied] only to sanctionable acts which occurred in

connection with the proceedings in the trial Court'"). But these passages in no way contradict the other statements by the trial court which make express reference to prelitigation conduct. At most, these passages render the court's order ambiguous, for the District Court appears to have adopted an expansive definition of "acts which occurred in connection with" the litigation. There is no question but that some sanctionable acts did occur in court. The problem is that the District Court opinion avoids any clear delineation of the acts being sanctioned and the power invoked to do so. This confusion in the premises of the District Court's order highlights the mischief caused by reliance on undefined inherent powers rather than on Rules and statutes that proscribe particular behavior. The ambiguity of the scope of the sanctionable conduct cannot be resolved against petitioner alone, who, despite the conceded bad-faith conduct of his attorneys, has been slapped with all of respondent's not inconsiderable attorney's fees. At the very least, adherence to the rule of law requires the case to be remanded to the District Court for clarification on the scope of the sanctioned conduct.

III

My discussion should not be construed as approval of the behavior of petitioner and his attorneys in this case. Quite the opposite. Our Rules permit sanctions because much of the conduct of the sort encountered here degrades the profession and disserves justice. District courts must not permit this abuse and must not hesitate to give redress through the Rules and statutes prescribed. It may be that the District Court could have imposed the full million dollar sanction against petitioner through reliance on Federal Rules and statutes, as well as on a proper exercise of its inherent authority. But we should remand here because a federal court must decide cases based on legitimate sources of power. I would reverse the Court of Appeals with instructions to re-

mand to the District Court for a reassessment of sanctions consistent with the principles here set forth. For these reasons, I dissent.

JOHNSON *v.* HOME STATE BANK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–693. Argued April 16, 1991—Decided June 10, 1991

After petitioner Johnson defaulted on promissory notes secured with a mortgage on his farm, respondent Home State Bank (Bank) began foreclosure proceedings in state court. While foreclosure proceedings were pending, Johnson filed for liquidation under Chapter 7 of the Bankruptcy Code, and the Bankruptcy Court discharged him from personal liability on the notes. However, because the Bank's right to proceed against him *in rem* survived the bankruptcy, see 11 U. S. C. § 522(c)(2); *Long* v. *Bullard*, 117 U. S. 617, the Bank reinitiated the foreclosure proceedings once the automatic stay protecting his estate was lifted. The state court entered judgment for the Bank, but before the foreclosure sale, Johnson filed for reorganization under Chapter 13, listing the mortgage as a claim against his estate. The Bankruptcy Court confirmed his plan to pay the Bank's judgment in installments, but the District Court reversed, ruling that the Code does not allow a debtor to include in a Chapter 13 plan a mortgage used to secure an obligation for which personal liability has been discharged in Chapter 7 proceedings. The court did not reach the Bank's alternative argument that the Bankruptcy Court erred in finding that Johnson had proposed his plan in good faith and that the plan was feasible. The Court of Appeals affirmed, reasoning that, since Johnson's personal liability had been discharged, the Bank no longer had a "claim" against Johnson subject to rescheduling under Chapter 13.

Held:

1. A mortgage lien securing an obligation for which a debtor's personal liability has been discharged in a Chapter 7 liquidation is a "claim" within the meaning of § 101(5) and is subject to inclusion in an approved Chapter 13 reorganization Plan. Congress intended in § 101(5) to incorporate the broadest available definition of "claim," see *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552. As used in § 101(5), "right to payment" and "right to an equitable remedy" mean "nothing more nor less than an enforceable obligation." *Id.*, at 559. A surviving mortgage interest corresponds to an "enforceable obligation" of the debtor. Even after the debtor's personal obligations have been extinguished, the creditor still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can

be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Thus, a bankruptcy discharge extinguishes only one mode of enforcing a claim—an *in personam* action—while leaving intact another—an *in rem* action. Indeed, the need to codify *Long* v. *Bullard*, *supra*, presupposes that a mortgage interest is a "claim," because only "claims" are discharged. This conclusion is consistent with other parts of the Code—which contemplate circumstances in which a claim may consist of nothing more than a claim against the debtor's property, § 502(b)(1), and establish that the phrase "'claim against the debtor' includes claim against" the debtor's property, § 102(2)—and with the Code's legislative background and history. The Bank's contention that serial filings under Chapters 7 and 13 evade the limits that Congress intended to place on the Chapters' remedies is unpersuasive, since Congress has expressly prohibited various forms of serial filings, see, *e. g.*, § 727(a)(8), yet fashioned no similar prohibition with regard to Chapter 7 and 13 filings. In addition, the full range of Code provisions designed to protect Chapter 13 creditors, see, *e. g.*, § 1325(a), combined with Congress' intent that "claim" be construed broadly, makes it unlikely that Congress intended to use the Code's definition of "claim" to police the Chapter 13 process for abuse. Pp. 82–88.

2. Because the lower courts never addressed the issues of Johnson's good faith or the plan's feasibility, this Court declines to address those issues and leaves them for consideration on remand. P. 88.

904 F. 2d 563, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

W. Thomas Gilman argued the cause for petitioner. With him on the briefs were *Martin R. Ufford*, *Patricia A. Gilman*, *Edward J. Nazar*, *Laurie B. Williams*, *Mary Patricia Hesse*, and *Matthew C. Hesse*.

Calvin D. Rider argued the cause for respondent. With him on the brief were *Patricia M. Dengler* and *Robert C. Brown*.*

**David A. Searles*, *Henry J. Sommer*, *Eric L. Frank*, and *Mitchell W. Miller* filed a brief for the Consumers Education and Protective Association, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association by *John J. Gill III* and *Michael F. Crotty*; and for the Kansas Bankers Association by *Anne L. Baker* and *Charles N. Henson*.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether a debtor can include a mortgage lien in a Chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a Chapter 7 proceeding. We hold that the mortgage lien in such a circumstance remains a "claim" against the debtor that can be rescheduled under Chapter 13.

I

This case arises from the efforts of respondent Home State Bank (Bank) to foreclose a mortgage on the farm property of petitioner. Petitioner gave the mortgage to secure promissory notes to the Bank totaling approximately $470,000.[1] When petitioner defaulted on these notes, the Bank initiated foreclosure proceedings in state court. During the pendency of these proceedings, petitioner filed for a liquidation under Chapter 7 of the Bankruptcy Code. Pursuant to 11 U. S. C. § 727, the Bankruptcy Court discharged petitioner from personal liability on his promissory notes to the Bank. Notwithstanding the discharge, the Bank's right to proceed against petitioner *in rem* survived the Chapter 7 liquidation. After the Bankruptcy Court lifted the automatic stay protecting petitioner's estate, see 11 U. S. C. § 362, the Bank reinitiated the foreclosure proceedings.[2] Ultimately, the state court entered an *in rem* judgment of approximately $200,000 for the Bank.

Before the foreclosure sale was scheduled to take place, petitioner filed the Chapter 13 petition at issue here. In his

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[1] At the time at which the mortgage was executed, petitioner co-owned the property in question. However, by the time petitioner filed the Chapter 13 petition at issue in this case, he had acquired his wife's interest in the property. In addition, although petitioner's wife was a party in various of the proceedings surrounding disposition of the property, for simplicity we refer only to petitioner's role in these proceedings.

[2] During the course of the proceedings, the Bank acquired from another creditor a superior mortgage interest in petitioner's property.

Chapter 13 plan, petitioner listed the Bank's mortgage in the farm property as a claim against his estate and proposed to pay the Bank four annual installments and a final "balloon payment" equal in total value to the Bank's *in rem* judgment. Over the Bank's objection, the Bankruptcy Court confirmed the Chapter 13 plan. The Bank appealed to the District Court, arguing that the Code does not allow a debtor to include in a Chapter 13 plan a mortgage used to secure an obligation for which personal liability has been discharged in Chapter 7 proceedings; the Bank argued in the alternative that the Bankruptcy Court had erred in finding that petitioner had proposed the plan in good faith and that the plan was feasible. The District Court accepted the first of these arguments and disposed of the case on that ground. See *In re Johnson*, 96 B. R. 326, 328–330 (Kan. 1989).

The Court of Appeals affirmed. See 904 F. 2d 563 (CA10 1990). Emphasizing that petitioner's personal liability on the promissory notes secured by the mortgage had been discharged in the Chapter 7 proceedings, the court reasoned that the Bank no longer had a "claim" against petitioner subject to rescheduling under Chapter 13. See *id.*, at 565, 566. Like the District Court, the Court of Appeals disposed of the case without considering the Bank's contentions that Johnson's plan was not in good faith and was not feasible. See *id.*, at 566.

In contrast to the decision of the Tenth Circuit in this case, two other Circuit Courts of Appeals have concluded that a debtor *can* include a mortgage lien in a Chapter 13 plan even after the debtor's personal liability on the debt secured by the property has been discharged in a Chapter 7 liquidation. See *In re Saylors*, 869 F. 2d 1434, 1436 (CA11 1989); *In re Metz*, 820 F. 2d 1495, 1498 (CA9 1987). Having granted certiorari to resolve this conflict, see 498 U. S. 1066 (1991), we now reverse.

II

Chapter 13 of the Bankruptcy Code provides a reorganization remedy for consumer debtors and proprietors with relatively small debts. See generally H. R. Rep. No. 95–595, pp. 116–119 (1977). So long as a debtor meets the eligibility requirements for relief under Chapter 13, see 11 U. S. C. § 109(e),[3] he may submit for the bankruptcy court's confirmation a plan that "modif[ies] the rights of holders of secured claims . . . or . . . unsecured claims," § 1322(b)(2), and that "provide[s] for the payment of all or any part of any [allowed] claim," § 1322(b)(6). The issue in this case is whether a mortgage lien that secures an obligation for which a debtor's personal liability has been discharged in a Chapter 7 liquidation is a "claim" subject to inclusion in an approved Chapter 13 reorganization plan.

To put this question in context, we must first say more about the nature of the mortgage interest that survives a Chapter 7 liquidation. A mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. See 3 R. Powell, The Law of Real Property ¶467 (1990). A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquida-

[3] Section 109(e) states:

"Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title."

tion. See 11 U. S. C. § 727. However, such a discharge extinguishes *only* "the personal liability of the debtor." 11 U. S. C. § 524(a)(1). Codifying the rule of *Long* v. *Bullard*, 117 U. S. 617 (1886), the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. See 11 U. S. C. § 522(c)(2); *Owen* v. *Owen*, 500 U. S. 305, 308–309 (1991); *Farrey* v. *Sanderfoot*, 500 U. S. 291, 297 (1991); H. R. Rep. No. 95–595, *supra*, at 361.

Whether this surviving mortgage interest is a "claim" subject to inclusion in a Chapter 13 reorganization plan is a straightforward issue of statutory construction to be resolved by reference to "the text, history, and purpose" of the Bankruptcy Code. *Farrey* v. *Sanderfoot*, *supra*, at 298. Under the Code,

> "'[C]laim' means—
>
> "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> "(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U. S. C. § 101(5) (1988 ed., Supp. III).

We have previously explained that Congress intended by this language to adopt the broadest available definition of "claim." See *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 558, 563–564 (1990); see also *Ohio* v. *Kovacs*, 469 U. S. 274, 279 (1985). In *Davenport*, we concluded that "'right to payment' [means] nothing more nor less than an enforceable obligation . . . ." 495 U. S., at 559.[4]

[4] Using this definition, we held in *Davenport* that restitution orders imposed as a condition of probation in state criminal proceedings were "claims" dischargeable in a Chapter 13 reorganization. See 495 U. S., at 558–560. Congress subsequently overruled the result in *Davenport*. See

Applying the teachings of *Davenport*, we have no trouble concluding that a mortgage interest that survives the discharge of a debtor's personal liability is a "claim" within the terms of § 101(5). Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor.

The Court of Appeals thus erred in concluding that the discharge of petitioner's *personal liability* on his promissory notes constituted the complete termination of the Bank's *claim* against petitioner. Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*. Indeed, but for the codification of the rule of *Long* v. *Bullard*, *supra*, there can be little question that a "discharge" under Chapter 7 would have the effect of extinguishing the *in rem* component as well as the *in personam* component of any claim against the debtor. And because only "claims" are discharged under the Code,[5] the very need to codify *Long* v.

Criminal Victims Protection Act of 1990, Pub. L. 101–581, § 3, 104 Stat. 2865. It did so, however, by expressly withdrawing the Bankruptcy Court's power to discharge restitution orders under 11 U. S. C. § 1328(a), not by restricting the scope of, or otherwise amending, the definition of "claim" under § 101(5). Consequently, we do not view the Criminal Victims Protection Act as disturbing our general conclusions on the breadth of the definition of "claim" under the Code.

[5] A bankruptcy discharge extinguishes "the personal liability of the debtor with respect to any *debt*." 11 U. S. C. § 524(a)(1) (emphasis added). As we explained in *Davenport*, "debt," which is defined under the Code as "liability on a claim," 11 U. S. C. § 101(12) (1988 ed., Supp. III), has a meaning coextensive with that of "claim" as defined in § 101(5). *Pennsyl-*

Bullard presupposes that a mortgage interest is otherwise a "claim."

The conclusion that a surviving mortgage interest is a "claim" under § 101(5) is consistent with other parts of the Code. Section 502(b)(1), for example, states that the bankruptcy court "shall determine the amount of [a disputed] claim . . . and shall allow such claim in such amount, except to the extent that . . . such claim is unenforceable against the debtor *and property of the debtor*" (emphasis added). In other words, the court must allow the claim if it is enforceable against *either* the debtor *or* his property. Thus, § 502(b)(1) contemplates circumstances in which a "claim," like the mortgage lien that passes through a Chapter 7 proceeding, may consist of nothing more than an obligation enforceable against the debtor's property. Similarly, § 102(2) establishes, as a "[r]ul[e] of construction," that the phrase "'claim against the debtor' includes claim against property of the debtor." A fair reading of § 102(2) is that a creditor who, like the Bank in this case, has a claim enforceable only against the debtor's property nonetheless has a "claim against the debtor" for purposes of the Code.

The legislative background and history of the Code confirm this construction of "claim." Although the pre-1978 Bankruptcy Act contained no single definition of "claim," the Act did define "claim" as "includ[ing] all claims of whatever character against a debtor *or its property*" for purposes of Chapter X corporate reorganizations. See 11 U. S. C. § 506(1) (1976 ed.) (emphasis added). It is clear that Congress so defined "claim" in order to confirm that creditors with interests enforceable only against the property of the debtor had "claims" for purposes of Chapter X, see S. Rep. No. 1916, 75th Cong., 3d Sess., 25 (1938); H. R. Rep. No. 1409, 75th Cong., 1st Sess., 39 (1937), and such was the

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vania Dept. of Public Welfare v. *Davenport*, *supra*, at 558. Hence, a discharge under the Code extinguishes the debtor's personal liability on his creditor's claims.

established understanding of the lower courts. See generally 6 J. Moore & L. King, Collier on Bankruptcy ¶2.05, pp. 307–308 (14th ed. 1978) ("[I]t is to be noted that a claim against the debtor's property alone is sufficient" for Chapter X). In fashioning a single definition of "claim" for the 1978 Bankruptcy Code, Congress intended to "adop[t] an *even broader* definition of claim than [was] found in the [pre-1978 Act's] debtor rehabilitation chapters." H. R. Rep. No. 95–595, at 309 (emphasis added); accord, S. Rep. No. 95–989, pp. 21–22 (1978); see also *Pennsylvania Dept. of Public Welfare* v. *Davenport*, *supra*, at 558, 563–564 (recognizing that Congress intended broadest available definition of claim). Presuming, as we must, that Congress was familiar with the prevailing understanding of "claim" under Chapter X of the Act, see *Cottage Savings Assn.* v. *Commissioner*, 499 U. S. 554, 562 (1991); *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979), we must infer that Congress fully expected that an obligation enforceable only against a debtor's property would be a "claim" under § 101(5) of the Code.

The legislative history surrounding § 102(2) directly corroborates this inference. The Committee Reports accompanying § 102(2) explain that this rule of construction contemplates, *inter alia*, "nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally." H. R. Rep. No. 95–595, *supra*, at 315; accord, S. Rep. No. 95–989, *supra*, at 28. Insofar as the mortgage interest that passes through a Chapter 7 liquidation is enforceable only against the debtor's property, this interest has the same properties as a nonrecourse loan. It is true, as the Court of Appeals noted, that the debtor and creditor in such a case did not conceive of their credit agreement as a nonrecourse loan when they entered it. See 904 F. 2d, at 566. However, insofar as Congress did not expressly limit § 102(2) to nonrecourse loans but rather chose general language broad enough to encompass such obliga-

tions, we understand Congress' intent to be that § 102(2) extend to all interests having the relevant attributes of nonrecourse obligations regardless of how these interests come into existence.

The Bank resists this analysis. It contends that even if an obligation enforceable only against the debtor's property might normally be treated as a "claim" subject to inclusion in a Chapter 13 plan, such an obligation should not be deemed a claim against the debtor when it is merely the remainder of an obligation for which the debtor's personal liability has been discharged in a Chapter 7 liquidation. Serial filings under Chapter 7 and Chapter 13, respondent maintains, evade the limits that Congress intended to place on these remedies.

We disagree. Congress has expressly prohibited various forms of serial filings. See, *e. g.*, 11 U. S. C. § 109(g) (no filings within 180 days of dismissal); § 727(a)(8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); § 727(a)(9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing). The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. *United States* v. *Smith*, 499 U. S. 160, 167 (1991) (expressly enumerated exceptions presumed to be exclusive).

The Bank's contention also fails to apprehend the significance of the full range of Code provisions designed to protect Chapter 13 creditors. A bankruptcy court is authorized to confirm a plan only if the court finds, *inter alia*, that "the plan has been proposed in good faith," § 1325(a)(3); that the plan assures unsecured creditors a recovery as adequate as "if the estate of the debtor were liquidated under chapter 7," § 1325(a)(4); that secured creditors either have "accepted the

plan," obtained the property securing their claims, or "retain[ed] the[ir] lien[s]" where "the value . . . of property to be distributed under the plan . . . is not less than the allowed amount of such claim[s]," § 1325(a)(5); and that "the debtor will be able to make all payments under the plan and to comply with the plan," § 1325(a)(6). In addition, the bankruptcy court retains its broad equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code.]" § 105(a). Any or all of these provisions may be implicated when a debtor files serially under Chapter 7 and Chapter 13. But given the availability of these provisions, and given Congress' intent that "claim" be construed broadly, we do not believe that Congress intended the bankruptcy courts to use the Code's definition of "claim" to police the Chapter 13 process for abuse.

III

The Bank renews here its claim that the Bankruptcy Court erred in finding petitioner's plan to be in good faith for purposes of § 1325(a)(3) and feasible for purposes of § 1325(a)(6) of the Code. Because the District Court and Court of Appeals disposed of this case on the ground that the Bank's mortgage interest was not a "claim" subject to inclusion in a Chapter 13 plan, neither court addressed the issues of good faith or feasibility. We also decline to address these issues and instead leave them for consideration on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MELKONYAN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–5538. Argued April 15, 1991—Decided June 10, 1991

Petitioner filed suit in the District Court under 42 U. S. C. § 1383(c)(3), which incorporates 42 U. S. C. § 405(g)'s review provisions, seeking review of a final decision of respondent Secretary of Health and Human Services denying his application for disability benefits under the Supplemental Security Income program. While his case was pending, he filed a new application, accompanied by additional evidence of disability, and was awarded benefits. Subsequently, the Secretary requested that the court remand the first claim for reconsideration. Responding to petitioner's motion that it either issue a decision on his motion for summary judgment or remand the case, the court granted the Secretary's remand motion, "concurred in by plaintiff," and remanded the case "to the Secretary for all further proceedings." On remand, the first decision was vacated and petitioner was found disabled as of his original application date. Over a year later, he applied to the District Court for attorney's fees under the Equal Access to Justice Act (EAJA), which, *inter alia*, permits an award of fees and expenses to a party prevailing against the United States "in any civil action . . . in any court," 28 U. S. C. § 2412(d)(1)(A), upon an application made within 30 days of "final judgment in the action," § 2412(d)(1)(B). The court denied the request on the ground that the Secretary's position in the litigation had been substantially justified. However, the Court of Appeals vacated, concluding that petitioner's application was untimely because the administrative determination on remand was a "final judgment," which triggered the 30-day period.

Held:

1. EAJA's plain language makes clear that a "final judgment" for purposes of § 2412(d)(1)(B) is a judgment rendered by a court that terminates the civil action for which EAJA fees may be received. Subsections (d)(1)(A) and (d)(1)(B) work in tandem, and subsection (d)(1)(B)'s requirement that the fee application be filed within 30 days of "final judgment *in the action*" (emphasis added) plainly refers back to the "civil action . . . in any court" in subsection (d)(1)(A). This reading is reinforced by the contrast between § 2412 and 5 U. S. C. § 504(a), the only EAJA provision allowing awards for administrative proceedings conducted

prior to the filing of a civil action. While § 504(a)(2)'s pertinent language largely mirrors that of § 2412(d)(1)(B), it requires that a fee application be filed within 30 days "of a final disposition in the adversary adjudication," which includes an administrative agency's adjudication, rather than "final judgment in the action," which a court renders. The Secretary errs in arguing that EAJA's definition of "final judgment"—"final and *not* appealable"—differs so significantly from the traditional definition—final and appealable—that it must include administrative agencies' decisions, since this suggestion does not alter § 2412(d)(1)(B)'s unambiguous requirement of judgment by a court, and since Congress adopted this unusual definition to clarify that a judgment was final only after the time for taking an appeal from a district court's judgment had expired. *Sullivan* v. *Hudson*, 490 U. S. 877, is not to the contrary, for it stands only for the proposition that a claimant may collect EAJA fees for work done in postremand administrative proceedings where a civil action has been filed and the district court retains jurisdiction over the action and contemplates entering a judgment at the proceedings' completion. Pp. 93–97.

2. A district court may remand a final decision of the Secretary only as provided in sentences four and six of 42 U. S. C. § 405(g): in conjunction with a judgment affirming, modifying, or reversing the Secretary's decision (sentence four), or in light of additional evidence without any substantive ruling as to the correctness of the Secretary's decision, but only if the claimant shows good cause for failing to present the evidence earlier (sentence six). The conclusion that Congress intended to so limit courts' authority to enter remand orders is dictated by § 405(g)'s language, which explicitly delineates only two circumstances under which such remands are authorized, cf. *United States* v. *Smith*, 499 U. S. 160, and is supported by § 405(g)'s legislative history. This view also harmonizes with EAJA's final judgment requirement, with the 30-day period beginning in sentence four cases after the court enters its judgment and the appeal period runs, and beginning in sentence six cases after the Secretary returns to court following a postremand proceeding's completion, the court enters a judgment, and the appeal period runs. Pp. 97–102.

3. This matter must be remanded for the District Court to clarify its order because the record does not clearly indicate what it intended by its disposition. It is not certain that this was a sentence six remand. The court did not make a "good cause" finding or seem to anticipate that the parties would return to court, and it may be that the court treated the joint remand request as a voluntary dismissal under Federal Rule of Civil Procedure 41(a). If it was a sentence six remand, once the Secretary returns to the District Court and the court enters a final judgment, petitioner will be entitled to EAJA fees unless the Secretary's position was substantially justified, an issue the Court of Appeals never ad-

dressed. And if it was not such a remand, petitioner may be entitled to no fees at all. Pp. 102–103.

4. This case is not an appropriate vehicle for resolving the issue whether petitioner's application is timely. In a sentence six remand, he will not be prejudiced if the District Court determines that an application filed before final judgment is sufficient or if he reapplies after the judgment's entry. And timeliness may not be at issue if this was not a sentence six remand. P. 103.

895 F. 2d 556, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Brian Wolfman argued the cause for petitioner. With him on the briefs were *Alan B. Morrison*, *Patti A. Goldman*, and *John Ohanian*.

Clifford M. Sloan argued the cause for respondent. On the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Shapiro*, *Edwin S. Kneedler*, and *William Kanter*.

JUSTICE O'CONNOR delivered the opinion of the Court.

A party that prevails against the United States in a civil action is entitled, in certain circumstances, to an award of attorney's fees, court costs, and other expenses. Equal Access to Justice Act (EAJA), 28 U. S. C. §2412. Among other requirements, the prevailing party must submit to the court an application for fees and expenses "within thirty days of final judgment in the action." §2412(d)(1)(B). This case requires us to decide whether an administrative decision rendered following a remand from the District Court is a "final judgment" within the meaning of EAJA.

I

In May 1982, petitioner Zakhar Melkonyan filed an application for disability benefits under the Supplemental Security Income (SSI) program established by Title XVI of the Social Security Act, 86 Stat. 1465, as amended, 42 U. S. C. §1381 *et seq.* Following a hearing, an Administrative Law Judge (ALJ) concluded that petitioner was not disabled within the

meaning of the Act. The Appeals Council denied review of the ALJ's decision. In June 1984, petitioner timely filed a complaint in the United States District Court for the Central District of California, seeking judicial review pursuant to 42 U. S. C. § 1383(c)(3), which incorporates the review provisions of 42 U. S. C. § 405(g).

On May 30, 1984, shortly before filing the complaint, petitioner filed a second application for SSI disability benefits accompanied by new evidence of disability. In August 1984, petitioner's *second* application was approved as of the date it was filed. He then sought summary judgment in his action to review the administrative decision denying his *first* application for benefits. The Secretary cross-filed for summary judgment.

While the summary judgment motions were pending, the Secretary requested that the case be remanded to the Appeals Council so the first application could be reconsidered in light of the new evidence. Petitioner initially opposed the Secretary's remand request, arguing that evidence already in the record amply established his disability. Three months later, however, citing failing health and the prospect of increased medical expenses, petitioner moved the court to "either issue [the decision] or remand the cause to the Secretary." App. 9–10. In response, on April 3, 1985, the District Court entered a "judgment" which read in its entirety:

> "Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings." App. 11.

One month after the remand, the Appeals Council vacated the ALJ's prior decision and found petitioner disabled as of the date of his original SSI application. That decision granted petitioner all the relief he had initially requested.

More than a year later, petitioner applied to the District Court for attorney's fees under EAJA. The Magistrate recommended that the fee application be denied, concluding that

the Secretary's decision to deny the first application was "substantially justified" at the time because the original record did not establish that petitioner was disabled. App. 20–21. The District Court agreed and denied the fee request.

The Court of Appeals for the Ninth Circuit vacated the District Court's judgment. It agreed that petitioner was not eligible for attorney's fees under EAJA, but for a different reason. *Melkonyan* v. *Heckler*, 895 F. 2d 556 (1990). The Court of Appeals noted that EAJA requires an application for fees to be filed within 30 days of the "'final judgment in the action,'" a term defined in the statute as a "'judgment that is final and not appealable.'" *Id.*, at 557 (quoting 28 U. S. C. § 2412(d)(2)(G)). In the court's view, its task was to determine when that "final and not appealable" judgment was rendered. 895 F. 2d, at 557.

The Court of Appeals recognized that the District Court's order remanding the case to the Secretary was not a "final judgment" because both parties anticipated further administrative proceedings. *Id.*, at 557–558. On remand, the Appeals Council reversed itself and held for petitioner; having won all he had asked for, there was no reason to return to the District Court. Under those circumstances, the Court of Appeals concluded that the Appeals Council's decision to award benefits was, in effect, a "final judgment" under EAJA, thereby commencing the 30-day period for filing the fee application. *Id.*, at 558–559. Because petitioner waited more than a year after the Appeals Council's decision, his application was untimely. *Id.*, at 559. We granted certiorari, 498 U. S. 1023 (1991), and now vacate the judgment of the Court of Appeals.

II

As relevant to this case, EAJA provides:

> "(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, . . . incurred by that party *in any civil action* (other than cases

sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States *in any court* having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of *final judgment in the action*, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection . . . ." 28 U. S. C. §§ 2412(d)(1)(A), (B) (emphasis added).

Petitioner argues that this provision is most naturally read to mean that it is *the court before which the civil action is pending* that must render the "final judgment" that starts the running of the 30-day EAJA filing period. Brief for Petitioner 13. We agree. As the highlighted language indicates, subsections (d)(1)(A) and (d)(1)(B) work in tandem. Subsection (d)(1)(A) authorizes the awarding of fees to parties that prevail against the United States in nontort civil actions, subject to qualifications not pertinent here. Subsection (d)(1)(B) explains what the prevailing party must do to secure the fee award. The requirement that the fee application be filed within 30 days of "final judgment *in the action*" plainly refers back to the "civil action . . . in any court" in (d)(1)(A). The plain language makes clear that a "final judgment" under § 2412 can only be the judgment of a court of law. This reading is reinforced by the contrast between § 2412 and 5 U. S. C. § 504(a). Section 504 was enacted at the same time as § 2412, and is the only part of the EAJA that allows fees and expenses for administrative proceedings conducted prior to the filing of a civil action. The pertinent language of § 504(a)(2) largely mirrors that of § 2412(d)(1)(B), with one notable exception: It states that a "party seeking an award of fees and other expenses shall, within thirty days of

a *final disposition in the adversary adjudication*," file an application for fees. 5 U. S. C. § 504(a)(2) (emphasis added). Clearly Congress knew how to distinguish between a "final judgment in [an] action" and a "final disposition in [an] adversary adjudication." One is rendered by a court; the other includes adjudication by an administrative agency.

The Secretary's sole argument to the contrary rests on the 1985 amendments to EAJA, which added a definition of "final judgment" to § 2412. Traditionally, a "final judgment" is one that is final and appealable. See Fed. Rule Civ. Proc. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies"); *Sullivan* v. *Finkelstein*, 496 U. S. 617, 628 (1990) ("'[F]inal judgments' are at the core of matters appealable under § 1291"). Under § 2412, as amended, however, a "final judgment" is one that is "final and *not* appealable." 28 U. S. C. § 2412(d)(2)(G) (emphasis added). In the Secretary's view, "[t]his significant departure from the usual characteristi[c] of a 'judgment' entered by a court" dictates a different understanding of how the phrase "final judgment" is used in § 2412(d)(1)(B). Brief for Respondent 20. The Secretary argues that under the revised statute, a "final judgment" includes not only judgments rendered by a court, but also decisions made by administrative agencies. *Ibid.*

We reject this argument. Section 2412(d)(1)(B) does not speak merely of a "judgment"; it speaks of a "final judgment *in the action*." As we have explained, the "action" referred to in subsection (d)(1)(B) is a "civil action . . . in any court" under subsection (d)(1)(A). The Secretary's suggested interpretation of "final judgment" does not alter this unambiguous requirement of judgment by a *court*.

As for why Congress added the unusual definition of "final judgment," the answer is clear. "The definition . . . was added in 1985 to resolve a conflict in the lower courts on the question whether a 'judgment' was to be regarded as 'final' for EAJA purposes when it was entered, or only when the

period for taking an appeal had lapsed." Brief for Respondent 20 (footnote omitted). The Ninth Circuit had held that the 30-day EAJA filing period began to run when the district court entered judgment. *McQuiston* v. *Marsh*, 707 F. 2d 1082, 1085 (1983). The Seventh Circuit rejected this view, holding that the EAJA filing period should be deemed to begin only after the time for taking an appeal from the district court judgment had expired. *McDonald* v. *Schweiker*, 726 F. 2d 311, 314 (1983). Accord, *Massachusetts Union of Public Housing Tenants, Inc.* v. *Pierce*, 244 U. S. App. D. C. 34, 36, 755 F. 2d 177, 179 (1985).

Congress responded to this split in the federal courts by explicitly adopting and ratifying the *McDonald* approach. S. Rep. No. 98–586, p. 16 (1984) ("The Committee believes that the interpretation of the court in *[McDonald]* is the correct one"). See also H. R. Rep. No. 98–992, p. 14 (1984) ("The term 'final judgment' has been clarified to mean a judgment the time to appeal which has expired for all parties"); H. R. Rep. No. 99–120, p. 18 (1985). There simply is no evidence to support the argument the Secretary now advances—that, in defining "final judgment" so as to resolve an existing problem, Congress also intended, *sub silentio*, to alter the meaning of the term to include a final agency decision. We conclude that, notwithstanding the 1985 amendment, Congress' use of "judgment" in 28 U. S. C. § 2412 refers to judgments entered *by a court of law*, and does not encompass decisions rendered by an administrative agency. Accordingly, we hold that a "final judgment" for purposes of 28 U. S. C. § 2412(d)(1)(B) means a judgment rendered by a court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that "final judgment" has expired.

Our decision in *Sullivan* v. *Hudson*, 490 U. S. 877 (1989), is not to the contrary. The issue in *Hudson* was whether, under § 2412(d), a "civil action" could include administrative proceedings so that a claimant could receive attorney's fees

for work done at the administrative level following a remand by the district court. We explained that certain administrative proceedings are "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." *Id.*, at 892. We defined the narrow class of qualifying administrative proceedings to be those "where 'a suit [has been] brought in a court,' *and* where 'a formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings.*" *Ibid.* (emphasis added). *Hudson* thus stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level. *Ibid.* "We did not say that proceedings on remand to an agency are 'part and parcel' of a civil action in federal district court for all purposes . . . ." *Sullivan* v. *Finkelstein*, *supra*, at 630–631.

III

Having decided that EAJA requires a "final judgment" entered by a court, it is obvious that no "final judgment" was entered in this case before petitioner initiated his appeal. Petitioner filed a civil action in the District Court under 42 U. S. C. § 405(g), seeking review of the Secretary's decision that he was not entitled to disability benefits. Without ruling on the correctness of the Secretary's decision, the District Court remanded the case for further administrative proceedings. On remand, the Appeals Council awarded petitioner the disability benefits he sought. Neither petitioner nor the Secretary returned to the District Court for entry of a final judgment. The question we must decide now is whether either party is entitled to do so.

The answer depends on what kind of remand the District Court contemplated. In *Finkelstein*, we examined closely

the language of § 405(g) and identified two kinds of remands under that statute: (1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence. See 496 U. S., at 623–629. The fourth sentence of § 405(g) authorizes a court to enter "a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The parties agree that the remand order in this case was not entered pursuant to sentence four, as the District Court did not affirm, modify, or reverse the Secretary's decision. We concur. The District Court did not make any substantive ruling; it merely returned the case to the agency for disposition, noting that both parties agreed to this course.

The sixth sentence of § 405(g), as we explained in *Finkelstein*, "describes an entirely different kind of remand." *Id.*, at 626. The district court does not affirm, modify, or reverse the Secretary's decision; it does not rule in any way as to the correctness of the administrative determination. Rather, the court remands because new evidence has come to light that was not available to the claimant at the time of the administrative proceeding and that evidence might have changed the outcome of the prior proceeding. *Ibid.* The statute provides that following a sentence six remand, the Secretary must return to the district court to "file with the court any such additional or modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based." 42 U. S. C. § 405(g).[1]

[1] Sentence six of § 405(g) provides in full:

"The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his

Petitioner argues, plausibly, that the court contemplated a sentence six remand. Indeed, it is undisputed that it was consideration of later-acquired evidence that led the Appeals Council ultimately to reverse its earlier decision and declare petitioner eligible for benefits from the date of his original application. Petitioner further argues that this must have been a sentence six remand because § 405(g) authorizes only two kinds of remands—those pursuant to sentence four and those pursuant to sentence six—and the Secretary concedes that this was not a sentence four remand.

The Secretary maintains that this was not a sentence six remand. While acknowledging that the remand request was prompted by the discovery of new evidence of disability, see Brief for Respondent 27–28, the Secretary observes correctly that the sixth sentence of § 405(g) requires a showing of "good cause" for the failure to present the additional evidence in the prior proceeding and that the District Court did not rule explicitly that such a showing had been made. The Secretary also notes that the District Court did not manifest any intent to retain jurisdiction, as would be the case under sentence six, but rather remanded to the agency "for all further proceedings."

The Secretary also disputes petitioner's assumption that sentences four and six set forth the only kinds of remands that are permitted under § 405(g), arguing that the district court has inherent authority to enter other types of remand orders. *Id.*, at 28–29, n. 23. On this point, we think petitioner has the better of the argument. As mentioned, in *Finkelstein* we analyzed § 405(g) sentence by sentence and identified two kinds of possible remands under the statute. While we did not state explicitly at that time that these were the *only* kinds of remands permitted under the statute, we do so today. Under sentence four, a district court may remand in

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decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based."

conjunction with a judgment affirming, modifying, or reversing the Secretary's decision. Under sentence six, the district court may remand in light of additional evidence without making any substantive ruling as to the correctness of the Secretary's decision, but only if the claimant shows good cause for failing to present the evidence earlier.[2] Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized leads us to conclude that it intended to limit the district courts' authority to enter remand orders to these two types. Cf. *United States* v. *Smith*, 499 U. S. 160 (1991) (expressly enumerated exceptions presumed to be exclusive).

This reading of the statute is dictated by the plain language of § 405(g) and is supported by the legislative history. In amending the sixth sentence of § 405(g) in 1980, Congress made it unmistakably clear that it intended to limit the power of district courts to order remands for "new evidence" in Social Security cases. Pub. L. 96–265, § 307, 94 Stat. 458. The Senate Report accompanying the amendments explained:

> "[U]nder existing law the court itself, on its own motion or on motion of the claimant, has discretionary authority 'for good cause' to remand the case back to the ALJ. It would appear that, although many of these court remands are justified, some remands are undertaken because the judge disagrees with the outcome of the case even though he would have to sustain it under the 'substantial evidence rule.' Moreover, the number of these court remands seems to be increasing. . . . The bill would continue the provision of present law which gives the court discretionary authority to remand cases to the Secretary, *but adds the requirement that remand for the purpose of taking new evidence be limited to cases in which there is a showing that there is new evidence which*

[2] Sentence six also authorizes the district court to remand on motion by the Secretary made before the Secretary has filed a response in the action. That subcategory of sentence six remands is not implicated in this case.

> *is material and that there was good cause for failure to incorporate it into the record in a prior proceeding.*" S. Rep. No. 96–408, pp. 58–59 (1979) (emphasis added).

See also H. R. Rep. No. 96–100, p. 13 (1979) (same).

Congressman Pickle, one of the floor managers of the bill, echoed this explanation when he noted in a floor statement that with the amendment "we have tried to speed up the judicial process so that these cases would not just go on and on and on. The court could remand [them] back down to the ALJ without cause or other reason which was weakening the appeal process at that level." 125 Cong. Rec. 23383 (1979).

The amendment to sentence six, of course, was not intended to limit a district court's ability to order remands under sentence four. The House Report explains that "[t]his language [amending sentence six] is not to be construed as a limitation of judicial remands currently recognized under the law in cases which the Secretary has failed to provide a full and fair hearing, to make explicit findings, or to have correctly apply *[sic]* the law and regulations." H. R. Rep. No. 96–100, *supra*, at 13. Thus, under sentence four, a district court may still remand in conjunction with a judgment reversing in part the Secretary's decision.

It is evident from these passages that Congress believed courts were often remanding Social Security cases without good reason. While normally courts have inherent power, among other things, to remand cases, see *United States* v. *Jones*, 336 U. S. 641, 671 (1949), both the structure of § 405(g), as amended, and the accompanying legislative history show Congress' clear intent to limit courts to two kinds of remands in these cases. Cf. *Chambers* v. *NASCO, Inc.*, *ante*, p. 32 (finding no congressional intent to limit a court's inherent authority to impose sanctions).

In light of the foregoing, we conclude that in § 405(g) actions, remand orders must either accompany a final judgment affirming, modifying, or reversing the administrative decision in accordance with sentence four, or conform with

the requirements outlined by Congress in sentence six. Construing remand orders in this manner harmonizes the remand provisions of § 405(g) with the EAJA requirement that a "final judgment" be entered in the civil action in order to trigger the EAJA filing period. 28 U. S. C. § 2412(d)(1)(B). In sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. See § 2412(d)(2)(G). In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs.

Although we agree with petitioner that the district court's remand authority is confined to those circumstances specifically defined in § 405(g), we cannot state with certainty that the remand in this case was, as petitioner contends, a sentence six remand. As the Secretary points out, the District Court did not make a finding that "good cause" had been shown, nor did the court seem to anticipate that the parties would return to court following the administrative proceedings. Indeed, it may be that the court treated the joint request for remand as a voluntary dismissal under Federal Rule of Civil Procedure 41(a), although the parties did not file a signed stipulation, as required by the Rule. Because the record before us does not clearly indicate what the District Court intended by its disposition, we vacate the judgment and remand the matter to enable the District Court to clarify its order. If petitioner is correct that the court remanded the case under sentence six, the Secretary must return to District Court, at which time the court will enter a final judgment. Petitioner will be entitled to EAJA fees unless the Secretary's initial position was substantially justified, a question which was not addressed by the Court of Appeals. If, on the other hand, this was *not* a sentence six remand, it may be that petitioner is not entitled to EAJA fees at all. For

example, if the court's order was, in effect, a dismissal under Rule 41(a), the District Court's jurisdiction over the case would have ended at that point, and petitioner would not have been a prevailing party "in [a] civil action." 28 U. S. C. §2412(d)(1)(A). Under those circumstances, the Secretary would not return to the District Court and petitioner would not be eligible to receive EAJA fees.

IV

At oral argument the parties discussed the timeliness of petitioner's fee application. EAJA requires prevailing parties seeking an award of fees to file with the court, "*within thirty days of final judgment in the action*," an application for fees and other expenses. §2412(d)(1)(B) (emphasis added). Petitioner claims that this language permits him to apply for fees at any time *up to* 30 days after entry of judgment, and even before judgment is entered, as long as he has achieved prevailing party status. Tr. of Oral Arg. 16–18.

This case is not an appropriate vehicle for resolving the issue. If petitioner is correct that this was a sentence six remand, the District Court may determine that the application he has already filed is sufficient. Alternatively, petitioner can easily reapply for EAJA fees following the District Court's entry of a final judgment. In either case, petitioner will not be prejudiced by having filed prematurely. On the other hand, if this was not a sentence six remand, we have already explained that petitioner would not be entitled to fees, so the timeliness of the application will not be an issue.

The judgment of the Ninth Circuit Court of Appeals is vacated, and the case is remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION *v.* SOLIMINO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89–1895. Argued April 17, 1991—Decided June 10, 1991

Respondent Solimino filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner Astoria Federal Savings and Loan Association had dismissed him because of his age, in violation of the Age Discrimination in Employment Act of 1967 (Age Act). Under a worksharing agreement, the EEOC referred his claim to the state agency responsible for claims under New York's Human Rights Law. That agency found no probable cause under state law to believe that he was terminated on account of age, and its decision was upheld on administrative review. Rather than appealing that decision to state court, Solimino filed in the Federal District Court an Age Act suit grounded on the same factual allegations considered in the state proceedings. The court granted Astoria's motion for summary judgment, holding that the State's age-discrimination findings precluded federal litigation of the claim. The Court of Appeals reversed, inferring from the Age Act's structure a legislative intent to deny preclusive effect to such state administrative proceedings.

Held: Judicially unreviewed state administrative findings have no preclusive effect on age-discrimination proceedings in federal court. While well-established common-law principles, such as preclusion rules, are presumed to apply in the absence of a legislative intent to the contrary, Congress need not state expressly its intention to overcome a presumption of administrative estoppel. Clear-statement requirements are appropriate only where weighty and constant values are at stake, or where an implied legislative repeal is implicated. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243; *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248; *Morton* v. *Mancari*, 417 U. S. 535, 551. Such values are not represented by the lenient presumption in favor of administrative estoppel, the suitability of which varies according to context; nor does a finding against estoppel in this case give rise to an implied legislative repeal. Thus, the test for the presumption's application is whether administrative preclusion would be inconsistent with Congress' intent in enacting the particular statute. *University of Tennessee* v. *Elliott*, 478 U. S. 788, 796. The Age Act implies, in its filing requirements, that federal courts should recognize no preclusion by state administrative

findings. Both § 14(b) and § 7(d)(2) assume the possibility of federal consideration after state review. However, such proceedings would be strictly *pro forma*, with the employer likely enjoying an airtight defense, if state administrative findings were given preclusive effect. The provision, in § 14(b), for a claim's consideration in federal court after state proceedings are concluded would as a result be left essentially without effect, notwithstanding the rule that statutes should be read to avoid rendering superfluous any parts thereof. Administrative preclusion was likewise found not to apply with respect to claims arising under Title VII of the Civil Rights Act of 1964 in *Elliott*, *supra*, which held that Title VII's provision directing the EEOC to accord substantial weight to state administrative findings allowed for something less than preclusion. *Id.*, at 795. It is immaterial that the Age Act lacks a similar delimitation, since the Title VII provision was only the most obvious piece of evidence that administrative estoppel does not operate in a Title VII suit. This holding also comports with the Age Act's broader scheme and enforcement provisions, and, although Congress' wisdom in deciding against administrative preclusion is not relevant to this determination, its choice has plausible policy support. Pp. 107–114.

901 F. 2d 1148, affirmed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Paul J. Siegel argued the cause for petitioner. With him on the brief were *Roger S. Kaplan* and *Anthony H. Atlas*.

Leonard N. Flamm argued the cause for respondent. With him on the brief was *Joseph J. Gentile*.

Amy L. Wax argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Robert A. Long, Jr.*, *Donald R. Livingston*, *Gwendolyn Young Reams*, and *Lamont N. White*.*

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*Briefs of *amici curiae* urging reversal were filed for the Atlantic Legal Foundation by *Martin S. Kaufman* and *Douglas Foster*; and for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell*.

Briefs of *amici curiae* urging affirmance were filed for the New York State Division of Human Rights by *Robert Abrams*, Attorney General, *O. Peter Sherwood*, Solicitor General, and *Sanford M. Cohen* and *Marjorie*

JUSTICE SOUTER delivered the opinion of the Court.

The question presented is whether claimants under the Age Discrimination in Employment Act of 1967 (Age Act or Act), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency made with respect to an age-discrimination claim. We hold that such findings have no preclusive effect on federal proceedings.

Respondent Angelo Solimino had worked for petitioner Astoria Federal Savings and Loan Association for almost 40 years when at age 63 he was dismissed from his position as a vice president in the mortgage department. Less than two weeks later, on March 18, 1982, he filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC). Under a worksharing agreement between it and the state agency, see 29 CFR § 1626.10 (1990), the EEOC referred the matter to the New York State Division of Human Rights, which is responsible for preliminary investigation and disposition of age-discrimination cases under New York's Human Rights Law. On January 25, 1983, after a hearing at which both parties were represented by counsel, the state agency found no probable cause to believe that petitioner had terminated respondent because of his age. The ruling was affirmed on review for abuse of discretion by the State Human Rights Appeal Board on May 30, 1984. Although both the Division and the Appeal Board entertained respondent's complaint only on state-law grounds, neither party suggests that the elements of an age-discrimination claim differ as between the state and federal statutes.

Respondent did not seek review of the board's decision in state court, but instead filed an Age Act suit in the United States District Court for the Eastern District of New

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Fujiki, Assistant Attorneys General; and for the American Association of Retired Persons by *Cathy Ventrell-Monsees*.

York grounded on the same factual allegations considered in the state administrative proceedings. The District Court granted petitioner's motion for summary judgment, 715 F. Supp. 42 (1989), and relied heavily on the decision in *Stillians* v. *Iowa*, 843 F. 2d 276 (CA8 1988), in holding the common-law presumption of administrative estoppel to prevail by virtue of Congress' failure in either the language or legislative history of the Age Act "actually [to] addres[s] the issue." 715 F. Supp., at 47. It ruled accordingly that the determination of the State's Human Rights Division that petitioner had not engaged in age discrimination precluded federal litigation of the claim. The Court of Appeals for the Second Circuit reversed, 901 F. 2d 1148 (1990), inferring from the Act's structure a legislative intent to deny preclusive effect to such state administrative proceedings. We granted certiorari, 498 U. S. 1023 (1991), to resolve the conflict between the ruling here under review, see also *Duggan* v. *Board of Education of East Chicago Heights, Dist. No. 169, Cook County, Ill.*, 818 F. 2d 1291 (CA7 1987), and those of the Eighth Circuit in *Stillians*, *supra*, and of the Ninth Circuit in *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F. 2d 1279 (1986).

We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Constr. & Mining Co.*, 384 U. S. 394, 422 (1966). Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their

burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. See *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326 (1979). The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, see *University of Tennessee* v. *Elliott*, 478 U. S. 788, 798 (1986), which acts in a judicial capacity.

Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, the question is not whether administrative estoppel is wise but whether it is intended by the legislature. The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. See *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *United States* v. *Turley*, 352 U. S. 407, 411 (1957). Thus, where a common-law principle is well established, as are the rules of preclusion, see, *e. g.*, *Parklane Hosiery, supra; Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940), the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952).

This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme. Rules of plain statement and strict construction prevail only to the protection of weighty and constant values, be they constitutional, see, *e. g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U. S. 234, 243 (1985) (requiring plain statement of intention to abrogate immunity of States under the Eleventh Amendment), or otherwise, see, *e. g.*, *EEOC* v. *Arabian American*

Oil Co., 499 U. S. 244, 248 (1991) (requiring plain statement of extraterritorial statutory effect, "to protect against unintended clashes between our laws and those of other nations which could result in international discord"). See generally Eskridge, Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007 (1989). "In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass*, 404 U. S. 336, 349 (1971). Similar superior values, of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws, prompt the kindred rule that legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, "absent a clearly expressed congressional intention to the contrary." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

But the possibility of such an implied repeal does not cast its shadow here. We do not have before us the judgment of a state court, which would by law otherwise be accorded "the same full faith and credit in every court within the United States . . . as [it has] by law or usage in the courts of such State." 28 U. S. C. § 1738. In the face of § 1738, we have found state-court judgments in the closely parallel context of Title VII of the Civil Rights Acts of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, see *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978), to enjoy preclusive effect in the federal courts. See *Kremer* v. *Chemical Constr. Corp.*, 456 U. S. 461 (1982); see also *Allen* v. *McCurry*, 449 U. S. 90 (1980). This case, by contrast, implicates no such implied repeal, as § 1738 is inapplicable to the judicially unreviewed findings of state administrative bodies. See *Elliott*, *supra*, at 794. Nor does administrative preclusion represent independent values of such magnitude and constancy as to justify the protection of a clear-statement rule. Although administrative estoppel is favored as a matter of general policy, its

suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 57–58 (1974); *Pearson* v. *Williams*, 202 U. S. 281, 285 (1906). The presumption here is thus properly accorded sway only upon legislative default, applying where Congress has failed expressly or impliedly to evince any intention on the issue.

In *Elliott*, which also dealt with Title VII, the test for the presumption's application was thus framed as the question "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting [the statute]." 478 U. S., at 796. See also *Brown* v. *Felsen*, 442 U. S. 127, 136 (1979); Restatement (Second) of Judgments § 83(4)(a) (1982). In contrast to 42 U. S. C. § 1983, in which the Court discerned "'[n]othing . . . remotely express[ing] any congressional intent to contravene the common-law rules of preclusion,'" 478 U. S., at 797 (quoting *Allen* v. *McCurry*, 449 U. S. 90, 97–98 (1980)), Title VII was found by implication to comprehend just such a purpose in its direction that the EEOC accord "'substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local [employment discrimination] law.'" *Elliott*, *supra*, at 795 (quoting 42 U. S. C. § 2000e–5(b)). What does not preclude a federal agency cannot preclude a federal court, see *Kremer*, *supra*, at 470, and n. 7; *Duggan*, 818 F. 2d, at 1294; we accordingly held that in the district courts the "substantial weight" standard allowed clearly for something less than preclusion. *Elliott*, *supra*, at 795.

We reach the same result here, for the Age Act, too, carries an implication that the federal courts should recognize no preclusion by state administrative findings with respect to age-discrimination claims. While the statute contains no express delimitation of the respect owed to state agency findings, its filing requirements make clear that collateral estop-

pel is not to apply. Section 14(b) requires that where a State has its own age-discrimination law, a federal Age Act complainant must first pursue his claim with the responsible state authorities before filing in federal court. 29 U. S. C. § 633(b); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). It further provides that "no suit may be brought under [the Age Act] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." The deadline for filing with the EEOC likewise refers to the termination of prior state administrative action, § 7(d)(2) providing that where § 14(b) applies "[s]uch a charge shall be filed . . . within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U. S. C. § 626(d)(2). Both provisions plainly assume the possibility of federal consideration after state agencies have finished theirs.

And yet such federal proceedings would be strictly *pro forma* if state administrative findings were given preclusive effect. It goes without saying that complainants who succeed in state proceedings will not pursue suit in federal court (except perhaps when the state remedy, or its enforcement, is thought to be inadequate); § 14(b)'s requirement that claimants file with state authorities before doing so in federal court was in fact "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer*, *supra*, at 756. A complainant who looks to a federal court after termination of state proceedings will therefore ordinarily do so only when the state agency has held against him. In such a case, however, the employer would likely enjoy an airtight defense of collateral estoppel if a state agency determination on the merits were given preclusive effect. Cf. *Kremer*, *supra*, at 479–480. Insofar as applying preclusion would thus reduce to insignificance those cases in

which federal consideration might be pursued in the wake of the completed proceedings of state agencies, § 14(b)'s provision for just such consideration would be left essentially without effect. But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof. See, *e. g.*, *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).

That the Age Act lacks the "substantial weight" provision of Title VII's § 2000e–5(b) stressed in *Elliott* is immaterial. There was nothing talismanic about that language; it was "simply the most obvious piece of evidence that administrative *res judicata* does not operate in a Title VII suit." *Duggan*, *supra*, at 1297. It would indeed be ironic if that section were to make the difference between that statute and the Age Act insofar as preclusion in federal courts is concerned, for the language was added to Title VII not because the EEOC was applying administrative preclusion, or "giving state administrative decisions too much weight, but because it was affording them too little." *Kremer*, *supra*, at 471, n. 8. Similar provision has been unnecessary in the Age Act, for as to age-discrimination claims the EEOC of its own accord came to extend some level of deference to the determinations of state authorities. See Brief for United States et al. as *Amici Curiae* 24. It is, in any event, fair to say that even without Title VII's "substantial weight" requirement the Court would have found no administrative preclusion in that context. Title VII's § 706(c), 42 U. S. C. § 2000e–5(c), which also provides for federal court action in the aftermath of terminated state proceedings and is nearly identical to the Age Act's § 14(b), see *Oscar Mayer*, *supra*, at 755, would have provided yet further support for the Court's result there.

Thus § 14(b) suffices to outweigh the lenient presumption in favor of administrative estoppel, a holding that also comports with the broader scheme of the Age Act and the provisions for its enforcement. Administrative findings

with respect to the age-discrimination claims of federal employees enjoy no preclusive effect in subsequent judicial litigation, see *Rosenfeld* v. *Department of Army*, 769 F. 2d 237 (CA4 1985); *Nabors* v. *United States*, 568 F. 2d 657 (CA9 1978); cf. *Chandler* v. *Roudebush*, 425 U. S. 840 (1976) (same, with respect to Title VII claims), and since there is no reason to believe federal enforcement agencies are any less competent than their state counterparts, it would be anomalous to afford more deference to one than the other. It would, indeed, invite further capricious anomalies as well, for whether age-discrimination claims are investigated first by the EEOC or by state authorities is a matter over which the complainant has no control, see 29 CFR §§ 1626.9, 1626.10 (1990); whether or not he might receive his day in court (complete with jury, see 29 U. S. C. § 626(c)(2)), would then depend, under petitioner's theory, on bureaucratic chance. Petitioner's reading would also lead to disparities from State to State, depending on whether a given jurisdiction had an age-discrimination statute of its own. See § 633(b). Moreover, on the assumption that claimants fare better in federal court than before state agencies, and in light of § 14(a)'s provision that state proceedings are superseded upon commencement of federal action, see § 633(a), a recognition of administrative estoppel here would induce all claimants to initiate federal suit at the earliest opportunity after filing the state complaint, thereby defeating the purpose of deferral to resolve complaints outside the federal system. See *Oscar Mayer*, *supra*, at 755–756.

Finally, although the wisdom of Congress' decision against according preclusive effect to state agency rulings has no bearing upon the disposition of the case, that choice has plausible policy support. Although it is true that there will be some duplication of effort, the duplication need not be great. We speak, after all, only of agency determinations not otherwise subjected to judicial review; our reading of the statute will provide no more than a second chance to prove the claim,

and even then state administrative findings may be entered into evidence at trial. See *Chandler*, *supra*, at 863, n. 39. It also may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment. In this very case, the New York Division of Human Rights, which ruled against respondent on the merits, has itself appeared as *amicus* on his behalf, highlighting the shortfalls of its procedures and resources. See Brief for New York State Division of Human Rights as *Amicus Curiae* 18–22. Alternatively, by denying preclusive effect to any such agency determination, Congress has eliminated litigation that would otherwise result, from State to State and case to case, over whether the agency has in fact "act[ed] in a judicial capacity" and afforded the parties "an adequate opportunity to litigate," *Utah Constr. Co.*, 384 U. S., at 422, so as to justify application of a normal rule in favor of estoppel.

For these reasons, the District Court's grant of petitioner's motion for summary judgment was erroneous on the grounds stated. The judgment of the Court of Appeals is affirmed, and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

GOLLUST ET AL. *v.* MENDELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 90–659. Argued April 15, 1991—Decided June 10, 1991

Section 16(b) of the Securities Exchange Act of 1934 imposes strict liability on "beneficial owner[s]" of more than 10% of a corporation's listed stock, and on the corporation's officers and directors, for any profits realized from any purchase and sale, or sale and purchase, of such stock occurring within a 6-month period. Such "insiders" are subject to suit "instituted . . . by the issuer, or by the owner of any security of the issuer" in the issuer's name and behalf. After respondent Mendell, an owner of common stock in Viacom International, Inc. (International), instituted a § 16(b) suit against petitioners, allegedly "beneficial owners" of International stock, International was acquired by a shell subsidiary of what is now called Viacom, Inc. (Viacom). International merged with the subsidiary and became Viacom's wholly owned subsidiary and sole asset. Mendell received cash and stock in Viacom in exchange for his International stock. The District Court granted petitioners' motion for summary judgment on the ground that Mendell had lost standing to maintain the action because he no longer owned any International stock. The Court of Appeals reversed, holding that Mendell's continued prosecution of the action was not barred by the statute's language or existing case law and was fully consistent with the statutory objectives.

Held: Mendell has satisfied the statute's standing requirements. Pp. 121–128.

(a) Section 16(b) provides standing of signal breadth, expressly limited only by the conditions that the plaintiff be the "owner of [a] security" of the "issuer" at the time the suit is "instituted." Any "security"—including stock, notes, warrants, bonds, debentures, puts, and calls, 15 U. S. C. § 78c(a)(10)—will suffice to confer standing. There is no restriction in terms of the number or percentage of shares, or the value of any other security, that must be held. Nor is the security owner required to have had an interest in the issuer at the time of the short-swing trading. Although the security's "issuer" does not include parent or subsidiary corporations, 15 U. S. C. § 78c(a)(8), this requirement is determined at the time the § 16(b) action is "instituted." Congress intended to adopt the common understanding of the word "institute"—"inaugurate or commence; as to institute an action," Black's Law Dictionary 985–986 (3d ed. 1933)—which is confirmed by its use of the

same word elsewhere to mean the commencement of an action, see, *e. g.*, 8 U. S. C. § 1503(a). Pp. 121–124.

(b) A § 16(b) plaintiff must, however, throughout the period of his participation in the litigation, maintain some financial interest in the litigation's outcome, both for the sake of furthering the statute's remedial purposes by ensuring that enforcing parties maintain the incentive to litigate vigorously, and to avoid the serious constitutional question that would arise under Article III from a plaintiff's loss of all financial interest in the outcome of the litigation he had begun. But neither the statute nor its legislative history supports petitioners' argument that a plaintiff must continuously own a security of the issuer. Pp. 124–126.

(c) An adequate financial stake can be maintained when the plaintiff's interest in the issuer has been replaced by one in the issuer's new parent corporation. This is no less an interest than a bondholder's financial stake, which, although more attenuated, satisfies the initial standing requirement under the statute. Pp. 126–127.

(d) Here, Mendell owned a security of the issuer at the time he instituted this § 16(b) action, and he continues to maintain a financial interest in the litigation's outcome by virtue of his Viacom stock. Pp. 127–128.

909 F. 2d 724, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

Edwin B. Mishkin argued the cause for petitioners. With him on the briefs were *Victor I. Lewkow* and *Thomas G. Dagger*.

Irving Malchman argued the cause for respondents and filed a brief for respondent Mendell.

James R. Doty argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Roberts*, *Michael R. Dreeben*, *Paul Gonson*, *Jacob H. Stillman*, and *Thomas L. Riesenberg*.

JUSTICE SOUTER delivered the opinion of the Court.

Section 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p(b),[1] imposes a general rule of

[1] The text of § 16(b) reads in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any pur-

strict liability on owners of more than 10% of a corporation's listed stock for any profits realized from the purchase and sale, or sale and purchase, of such stock occurring within a 6-month period. These statutorily defined "insiders," as well as the corporation's officers and directors, are liable to the issuer of the stock for their short-swing profits, and are subject to suit "instituted . . . by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer . . . ." *Ibid.*

Our prior cases interpreting § 16(b) have resolved questions about the liability of an insider defendant under the statute.[2] This case, in contrast, requires us to address a

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chase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p(b).

The phrase "beneficial owner, director, or officer" is defined in § 16(a) as "[e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security . . . which is registered pursuant to [§ 12 of the 1934 Act], or who is a director or an officer of the issuer of such security . . . ." 15 U. S. C. § 78p(a).

[2] See *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U. S. 232 (1976) (defendant must be 10% beneficial owner before purchase to be subject to liability for subsequent sale); *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U. S. 582 (1973) (binding option to sell stock

plaintiff's standing under § 16(b) and, in particular, the requirements for continued standing after the institution of an action. We hold that a plaintiff, who properly "instituted [a § 16(b) action as] the owner of [a] security of the issuer," may continue to prosecute the action after his interest in the issuer is exchanged in a merger for stock in the issuer's new corporate parent.

I

In January 1987, respondent Ira L. Mendell filed a complaint under § 16(b) against petitioners in the United States District Court for the Southern District of New York, stating that he owned common stock in Viacom International, Inc. (International), and was suing on behalf of the corporation. He alleged that petitioners, a collection of limited partnerships, general partnerships, individual partners and corporations, "operated as a single unit" and were, for purposes of this litigation, a "single . . . beneficial owner of more than ten per centum of the common stock" of International. App. to Pet. for Cert. 40a–42a. Respondent claimed that petitioners were liable to International under § 16(b) for approximately $11 million in profits earned by them from trading in International's common stock between July and October 1986. *Id.*, at 42a–43a. The complaint recited that respondent had made a demand upon International and its board of directors to bring a § 16(b) action against petitioners and that more than 60 days had passed without the institution of an action.

In June 1987, less than six months after respondent had filed his § 16(b) complaint, International was acquired by Arsenal Acquiring Corp., a shell corporation formed by Arsenal Holdings, Inc. (now named Viacom, Inc.) (Viacom), for the purpose of acquiring International. By the terms of the acquisition, Viacom's shell subsidiary was merged with Inter-

not a "sale" for purposes of § 16(b)); *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972) (no liability for sales by defendant after its ownership interest fell below 10%); *Blau* v. *Lehman*, 368 U. S. 403 (1962) (partnership not liable under § 16(b) for trades by partner).

national, which then became Viacom's wholly owned subsidiary and only asset. The stockholders of International received a combination of cash and stock in Viacom in exchange for their International stock.[3] *Id.*, at 40a; App. 14–26.

As a result of the acquisition, respondent, who was a stockholder in International when he instituted this action, acquired stock in International's new parent corporation and sole stockholder, Viacom. Respondent amended his complaint to reflect the restructuring by claiming to prosecute the § 16(b) action on behalf of Viacom as well as International. App. to Pet. for Cert. 44a.

Following the merger, petitioners moved for summary judgment, arguing that respondent had lost standing to maintain the action when the exchange of stock and cash occurred, after which respondent no longer owned any security of International, the "issuer." The District Court held that § 16(b) actions "may be prosecuted only by the issuer itself or the holders of its securities," and granted the motion because respondent no longer owned any International stock.[4] App. to Pet. for Cert. 32a. The court concluded that only Viacom, as International's sole security holder, could continue to prosecute this action against petitioners. *Id.*, at 33a.

A divided Court of Appeals reversed. *Mendell ex rel. Viacom, Inc.* v. *Gollust*, 909 F. 2d 724 (CA2 1990). The majority saw nothing in the text of § 16(b) to require dismissal

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[3] International stockholders who chose not to exchange their shares under the terms of the merger were afforded appraisal rights under Ohio law. App. 25–26. Respondent did not exercise his right to appraisal.

[4] Respondent also sought to sue derivatively on behalf of International. App. to Pet. for Cert. 44a. This "double derivative" claim was dismissed by the District Court. *Id.*, at 33a. Because of its disposition of respondent's § 16(b) claim, the Court of Appeals did not reach this issue. *Mendell ex rel. Viacom, Inc.* v. *Gollust*, 909 F. 2d 724, 731 (CA2 1990). Although respondent now "urges upon th[is] Court the validity of his double derivative action," Brief for Respondent 26, this issue was not properly presented to this Court for review and we do not reach it.

of respondent's complaint. "[T]he language of the statute speaks of the 'owner' of securities; but such language is not modified by the word 'current' or any like limiting expression. The statute does not specifically bar the maintenance of § 16(b) suits by former shareholders and Congress . . . could readily have eliminated such individuals." *Id.*, at 730. Since the provisions of the statute were open to "interpretation," the court relied on the statute's remedial purposes in determining "whether the policy behind the statute is best served by allowing the claim." *Id.*, at 728–729. The majority concluded that the remedial policy favored recognizing respondent's continued standing after the merger. "Permitting [respondent] to maintain this § 16(b) suit is not barred by the language of the statute or by existing case law, and it is fully consistent with the statutory objectives."[5] *Id.*, at 731. The summary judgment for petitioners was reversed.

The dissent took issue with this analysis, finding it to be in conflict with prior decisions of the Second Circuit and at least one other. See *Portnoy* v. *Kawecki Berylco Industries, Inc.*, 607 F. 2d 765, 767 (CA7 1979); *Rothenberg* v. *United Brands Co.*, CCH Fed. Sec. L. Rep. ¶96,045 (SDNY), aff'd mem., 573 F. 2d 1295 (CA2 1977).

We granted certiorari, 498 U. S. 1023 (1991), to resolve this conflict and to determine whether a stockholder who has properly instituted a § 16(b) action to recover profits from a

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[5] The Court of Appeals observed:

"Here plaintiff's suit was timely, and while his § 16(b) suit was pending he was involuntarily divested of his share ownership in the issuer through a merger. But for that merger plaintiff's suit could not have been challenged on standing grounds. Although we decline—in keeping with § 16(b)'s objective analysis regarding defendants' intent—to inquire whether the merger was orchestrated for the express purpose of divesting plaintiff of standing, we cannot help but note that the incorporation of Viacom and the merger proposal occurred after plaintiff's § 16(b) claim was instituted. Hence, the danger of such intentional restructuring to defeat the enforcement mechanism incorporated in the statute is clearly present." 909 F. 2d, at 731.

corporation's insiders may continue to prosecute that action after a merger involving the issuer results in exchanging the stockholder's interest in the issuer for stock in the issuer's new corporate parent.

II

A

Congress passed § 16(b) of the 1934 Act to "preven[t] the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U. S. C. § 78p(b). As we noted in *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U. S. 232, 243 (1976): "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors." Prohibiting short-swing trading by insiders with nonpublic information was an important part of Congress' plan in the 1934 Act to "insure the maintenance of fair and honest markets," 15 U. S. C. § 78b; and to eliminate such trading, Congress enacted a "flat rule [in § 16(b)] taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 422 (1972); see also *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U. S. 582, 591–595 (1973).

The question presented in this case requires us to determine who may maintain an action to enforce this "flat rule." We begin with the text. Section 16(b) imposes liability on any "beneficial owner, director, or officer" of a corporation for "any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of [an] issuer . . . within any period of less than six months." 15 U. S. C. § 78p(b). A "[s]uit to recover [an insider's] profit may be instituted . . . by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer . . . ." *Ibid.*

The statute imposes a form of strict liability on "beneficial owner[s]," as well as on the issuer's officers and directors, rendering them liable to suits requiring them to disgorge their profits even if they did not trade on inside information or intend to profit on the basis of such information. See *Kern County Land Co.* v. *Occidental Petroleum Corp.*, *supra*, at 595. Because the statute imposes "liability without fault within its narrowly drawn limits," *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, *supra*, at 251, we have been reluctant to exceed a literal, "mechanical" application of the statutory text in determining who may be subject to liability, even though in some cases a broader view of statutory liability could work to eliminate an "evil that Congress sought to correct through § 16(b)." *Reliance Electric Co.* v. *Emerson Electric Co.*, *supra*, at 425.

To enforce this strict liability rule on insider trading, Congress chose to rely solely on the issuers of stock and their security holders. Unlike most of the federal securities laws, § 16(b) does not confer enforcement authority on the Securities and Exchange Commission. It is, rather, the security holders of an issuer who have the ultimate authority to sue for enforcement of § 16(b). If the issuer declines to bring a § 16(b) action within 60 days of a demand by a security holder, or fails to prosecute the action "diligently," 15 U. S. C. § 78p(b), then the security holder may "institut[e]" an action to recover insider short-swing profits for the issuer. *Ibid.*

In contrast to the "narrowly drawn limits" on the class of corporate insiders who may be defendants under § 16(b), *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, *supra*, at 251, the statutory definitions identifying the class of plaintiffs (other than the issuer) who may bring suit indicate that Congress intended to grant enforcement standing of considerable breadth. The only textual restrictions on the standing of a party to bring suit under § 16(b) are that the plaintiff

must be the "owner of [a] security" of the "issuer" at the time the suit is "instituted."

Although plaintiffs seeking to sue under the statute must own a "security," § 16(b) places no significant restriction on the type of security adequate to confer standing. "[A]ny security" will suffice, 15 U. S. C. § 78p(b), the statutory definition being broad enough to include stock, notes, warrants, bonds, debentures, puts, calls, and a variety of other financial instruments; it expressly excludes only "currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months . . . ." § 78c(a)(10); see also *Reves* v. *Ernst & Young*, 494 U. S. 56 (1990). Nor is there any restriction in terms of either the number or percentage of shares, or the value of any other security, that must be held. See *Portnoy* v. *Revlon, Inc.*, 650 F. 2d 895, 897 (CA7 1981) (plaintiff bought single share); *Magida* v. *Continental Can Co.*, 231 F. 2d 843, 847–848 (CA2) (plaintiff owned 10 shares), cert. denied, 351 U. S. 972 (1956). In fact, the terms of the statute do not even require that the security owner have had an interest in the issuer at the time of the defendant's short-swing trading, and the courts to have addressed this issue have held that a subsequent purchaser of the issuer's securities has standing to sue for prior short-swing trading. See, *e. g.*, *Dottenheim* v. *Murchison*, 227 F. 2d 737, 738–740 (CA5 1955), cert. denied, 351 U. S. 919 (1956); *Blau* v. *Mission Corp.*, 212 F. 2d 77, 79 (CA2), cert. denied, 347 U. S. 1016 (1954).

The second requirement for § 16(b) standing is that the plaintiff own a security of the "issuer" whose stock was traded by the insider defendant. An "issuer" of a security is defined under § 3(a)(8) of the 1934 Act as the corporation that actually issued the security, 15 U. S. C. § 78c(a)(8), and does not include parent or subsidiary corporations.[6] While this

[6] Cf. § 2(11) of the Securities Act of 1933, 15 U. S. C. § 77b(11) (definition of "issuer" for certain purposes is "any person directly or indirectly

requirement is strict on its face, it is ostensibly subject to mitigation in the final requirement for § 16(b) standing, which is merely that the plaintiff own a security of the issuer at the time the § 16(b) action is "instituted." Today, as in 1934, the word "institute" is commonly understood to mean "inaugurate or commence; as to institute an action." Black's Law Dictionary 985–986 (3d ed. 1933) (citing cases); see Black's Law Dictionary 800 (6th ed. 1990) (same definition); Random House Unabridged Dictionary of the English Language 988 (2d ed. 1987) ("to set in operation; to institute a lawsuit"). Congressional intent to adopt this common understanding is confirmed by Congress' use of the same word elsewhere to mean the commencement of an action. See, *e. g.*, 8 U. S. C. § 1503(a) ("action . . . may be instituted only within five years after . . . final administrative denial"); 42 U. S. C. § 405(g) ("Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office").

The terms of § 16(b), read in context, thus provide standing of signal breadth, expressly limited only by conditions existing at the time an action is begun. Petitioners contend, however, that the statute should at least be read narrowly enough to require the plaintiff owning a "security" of the "issuer" at the time the action is "instituted" to maintain ownership of the issuer's security throughout the period of his participation in the litigation. See Brief for Petitioners 11. But no such "continuous ownership requirement," *ibid.*, is found in the text of the statute, nor does § 16(b)'s legislative history reveal any congressional intent to impose one.

This is not to say, of course, that a § 16(b) action could be maintained by someone who is subsequently divested of any interest in the outcome of the litigation. Congress clearly intended to put "a private-profit motive behind the uncovering of this kind of leakage of information, [by making] the

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controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer").

stockholders [its] policemen." Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 136 (1934) (testimony of Thomas G. Corcoran) (hereinafter Hearings). The sparse legislative history on this question, which consists primarily of hearing testimony by one of the 1934 Act's drafters, merely confirms this conclusion.[7]

Congress must, indeed, have assumed any plaintiff would maintain some continuing financial stake in the litigation for a further reason as well. For if a security holder were allowed to maintain a § 16(b) action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction. See *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 804 (1985) (Article III requires "the party requesting standing [to allege] 'such a personal stake in the outcome of the controversy as to assure that concrete ad-

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[7] Petitioners have directed our attention only to a statement by Thomas G. Corcoran, a principal drafter of the statute, at one of the hearings on the 1934 Act. Corcoran testified that Congress could be confident that § 16(b) would be enforced because the enactment of the statute would "[say] to all of the stockholders of the company, 'You can recover any of this profit for your own account, if you find out that any such transactions are going on.'" Hearings 136. This statement was not, of course, a complete description of the class of plaintiffs entitled to § 16(b) standing, since "any security [holder]" may sue, not just stockholders. 15 U. S. C. § 78p(b). Nor was it meant as a precise description of a plaintiff's incentive to sue; the witness elsewhere made it clear that a stockholder plaintiff (or any other security holder) would not directly receive any recovery, but would be suing solely on the corporation's behalf:

"The fact that the stockholders, with an interest, are permitted to sue *to recover that profit for the benefit of the company*, puts anyone doing this particular thing, in the position of taking [a] risk that somebody with a profit motive will try to find out." Hearings 137 (emphasis added).

Corcoran's analysis does, however, demonstrate the statute's reliance for its enforcement on the profit motive in an issuer's security holders, a dependence that could hardly cease the moment after suit was filed.

verseness which sharpens the presentation of issues'") (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)); see also *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). Although "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Ibid.* Moreover, the plaintiff must maintain a "personal stake" in the outcome of the litigation throughout its course. See *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 395–397 (1980).

Hence, we have no difficulty concluding that, in the enactment of § 16(b), Congress understood and intended that, throughout the period of his participation, a plaintiff authorized to sue insiders on behalf of an issuer would have some continuing financial interest in the outcome of the litigation, both for the sake of furthering the statute's remedial purposes by ensuring that enforcing parties maintain the incentive to litigate vigorously and to avoid the serious constitutional question that would arise from a plaintiff's loss of all financial interest in the outcome of the litigation he had begun. See *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932) ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"); see also *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 465–466 (1989); *id.*, at 481 (KENNEDY, J., concurring in judgment).

B

The conclusion that § 16(b) requires a plaintiff security holder to maintain some financial interest in the outcome of the litigation does not, however, tell us whether an adequate financial stake can be maintained when the plaintiff's interest

in the issuer has been replaced by one in the issuer's new parent. We think it can be.

The modest financial stake in an issuer sufficient to bring suit is not necessarily greater than an interest in the original issuer represented by equity ownership in the issuer's parent corporation. A security holder eligible to institute suit will have no direct financial interest in the outcome of the litigation, since any recovery will inure only to the issuer's benefit. Yet the indirect interest derived through one share of stock is enough to confer standing, however slight the potential marginal increase in the value of the share. A bondholder's sufficient financial interest may be even more attenuated, since any recovery by the issuer will increase the value of the bond only because the issuer may become a slightly better credit risk.

Thus, it is difficult to see how such a bondholder plaintiff, for example, is likely to have a more significant stake in the outcome of a § 16(b) action than a stockholder in a company whose only asset is the issuer. Because such a bondholder's attenuated financial stake is nonetheless sufficient to satisfy the statute's initial standing requirements, the stake of a parent company stockholder like respondent should be enough to meet the requirements for continued standing, so long as that is consistent with the text of the statute. It is consistent, of course, and in light of the congressional policy of lenient standing, we will not read any further condition into the statute, beyond the requirement that a § 16(b) plaintiff maintain a financial interest in the outcome of the litigation sufficient to motivate its prosecution and avoid constitutional standing difficulties.

III

In this case, respondent has satisfied the statute's requirements. He owned a "security" of the "issuer" at the time he "instituted" this § 16(b) action. In the aftermath of International's restructuring, he retains a continuing financial interest in the outcome of the litigation derived from his stock in

International's sole stockholder, Viacom, whose only asset is International. Through these relationships, respondent still stands to profit, albeit indirectly, if this action is successful, just as he would have done if his original shares had not been exchanged for stock in Viacom. Although a calculation of the values of the respective interests in International that respondent held as its stockholder and holds now as a Viacom stockholder is not before us, his financial interest is actually no less real than before the merger and apparently no more attenuated than the interest of a bondholder might be in a § 16(b) suit on an issuer's behalf.

The judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

BURNS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89–7260. Argued December 3, 1990—Decided June 13, 1991

A plea agreement with the Government recited that petitioner Burns would plead guilty to three counts and stated the parties' expectation that his sentence would fall within a particular offense-level/criminal-history range under the United States Sentencing Commission's Guidelines. The probation officer, as required by Federal Rule of Criminal Procedure 32, filed a presentence report in which he confirmed the parties' expectation that the sentencing range would be 30 to 37 months and concluded that there were no factors that would warrant departure from the Guidelines sentence. Although neither party filed any objections to the report, the District Court announced, at the end of the sentencing hearing, that it was departing upward from the Guidelines range and, based upon three grounds, sentenced Burns to 60 months' imprisonment. The Court of Appeals affirmed the sentence, concluding that, although subdivision (a)(1) of Rule 32 requires a district court to afford the parties "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence" at the sentencing hearing, it would be inappropriate to impose on a district court a requirement that it notify the parties of its intent to make a *sua sponte* departure from the Guidelines in the absence of express language to that effect.

Held: Before a district court can depart upward from the applicable Guidelines range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure. Pp. 132–139.

(a) In order to eliminate the unwarranted disparities and uncertainty associated with indeterminate sentencing under the pre-existing system, the Sentencing Reform Act of 1984 requires district courts to determine sentences based on the various offense- and offender-related factors identified by the Guidelines. Under the Act, a district court may disregard the Guidelines' mechanical dictates only upon finding an aggravating or mitigating circumstance not adequately considered by the Commission. The Act amended Rule 32 to assure focused, adversarial development of the factual and legal issues relevant to determining the

appropriate Guidelines sentence. Although, ordinarily, the presentence report or the Government's recommendation will notify the defendant that an upward departure will be at issue and of the facts that allegedly support it, that will not be the case where, as here, the district court departs *sua sponte* from the Guidelines sentencing range. Pp. 132–135.

(b) The textual and contextual evidence of legislative intent indicates that Congress did not intend a district court to depart from the Guidelines *sua sponte* without first affording notice to the parties. The Government's contrary reading renders meaningless the parties' express right under Rule 32(a)(1) to "comment upon [relevant] matters," since the right to comment upon a departure has little reality or worth unless one is informed that a decision is contemplated. The Government's reading is also inconsistent with Rule 32's purpose. Under the Government's interpretation of Rule 32, a critical sentencing determination would go untested by the adversarial process in every case in which the parties, lacking notice, failed to anticipate an unannounced and uninvited departure by the district court from the Guidelines. Furthermore, the meaning that the Government attaches to Congress' silence is contrary to decisions in which, despite the absence of express statutory language, this Court has construed statutes authorizing analogous deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard. See, *e. g.*, *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 107–108. Since the Government's interpretation would require this Court to confront the serious question whether notice is mandated by the Due Process Clause, the Court will not construe Rule 32 to dispense with notice in this setting absent a clear statement of congressional intent to that effect. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575. Pp. 135–138.

282 U. S. App. D. C. 194, 893 F. 2d 1343, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. SOUTER, J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, and in Part I of which REHNQUIST, C. J., joined, *post*, p. 139.

Steven H. Goldblatt argued the cause and filed briefs for petitioner.

Stephen J. Marzen argued the cause for the United States. With him on the brief were *Acting Solicitor General Roberts*, *Acting Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *J. Douglas Wilson*.

JUSTICE MARSHALL delivered the opinion of the Court.

The question in this case is whether a district court may depart upward from the sentencing range established by the Sentencing Guidelines without first notifying the parties that it intends to depart. We hold that it may not.

I

Petitioner William Burns was employed by the United States Agency for International Development (AID) from 1967 until 1988. Between 1982 and 1988, petitioner used his position as a supervisor in the agency's Financial Management Section to authorize payment of AID funds into a bank account controlled by him in the name of a fictitious person. During this period, 53 fraudulent payments totaling over $1.2 million were paid into the account.

Following the Government's detection of this scheme, petitioner agreed to plead guilty to a three-count information charging him with theft of Government funds, 18 U. S. C. §641, making false claims against the Government, 18 U. S. C. §287, and attempted tax evasion, 26 U. S. C. §7201. The plea agreement stated the parties' expectation that petitioner would be sentenced within the Guidelines range corresponding to an offense level of 19 and a criminal history category of I.

The probation officer confirmed this expectation in his presentence report and found the applicable sentencing range to be 30 to 37 months. The report also concluded: "There are no factors that would warrant departure from the guideline sentence." App. 21. Both petitioner and the Government reviewed the presentence report, and neither party filed any objections to it.

Nonetheless, at the conclusion of the sentencing hearing, the District Court announced that it was departing upward from the Guidelines sentencing range. The District Court set forth three reasons for the departure: (1) the extensive duration of petitioner's criminal conduct; (2) the disruption to

governmental functions caused by petitioner's criminal conduct; and (3) petitioner's use of his tax evasion offense to conceal his theft and false claims offenses. Based upon these considerations, the District Court sentenced petitioner to 60 months' imprisonment.

On appeal, petitioner argued that Rule 32 of the Federal Rules of Criminal Procedure obliged the District Court to furnish advance notice of its intent to depart from the Guidelines. The Court of Appeals for the District of Columbia Circuit rejected petitioner's contention and affirmed his sentence. The court observed that, although subdivision (a)(1) of Rule 32 requires the district court to afford the parties "an opportunity to comment upon . . . matters relating to the appropriate sentence" at the sentencing hearing, the Rule contains no express language requiring a district court to notify the parties of its intent to make *sua sponte* departures from the Guidelines. The court determined that it would be inappropriate to impose such a requirement on district courts in the absence of such express statutory language. See 282 U. S. App. D. C. 194, 199, 893 F. 2d 1343, 1348 (1990).

By contrast, several other Circuits have concluded that Rule 32 does require a district court to provide notice of its intent *sua sponte* to depart upward from an applicable Guidelines sentencing range.[1] We granted certiorari to resolve this conflict. 497 U. S. 1023 (1990). We now reverse.

II

A

The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes. See generally *Mistretta* v. *United States*, 488 U. S. 361, 363–367 (1989). Before the Act, Congress was generally content to define broad sentencing ranges,

[1] See, *e. g.*, *United States* v. *Palta*, 880 F. 2d 636, 640 (CA2 1989); *United States* v. *Nuno-Para*, 877 F. 2d 1409, 1415 (CA9 1989); *United States* v. *Otero*, 868 F. 2d 1412, 1415 (CA5 1989).

leaving the imposition of sentences within those ranges to the discretion of individual judges, to be exercised on a case-by-case basis. Now, under the "guidelines" system initiated by the Act, district court judges determine sentences based on the various offense-related and offender-related factors identified by the Guidelines of the United States Sentencing Commission. See 18 U. S. C. §§ 3553(a)(4), (b). The purpose of this reform was to eliminate the "unwarranted disparit[ies] and . . . uncertainty" associated with indeterminate sentencing. See, *e. g.*, S. Rep. No. 98–225, p. 49 (1983). The only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ." 18 U. S. C. § 3553(b).

Procedural reforms, too, were necessary to achieve Congress' goal of assuring "certainty and fairness" in sentencing. See 28 U. S. C. § 991(b)(1)(B). As the Commission has explained:

> "In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. . . . *When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.*" U. S. Sentencing Comm'n, Guidelines Manual § 6A1.3, official commentary (1990) (emphasis added).

As amended by the Sentencing Reform Act, Federal Rule of Criminal Procedure 32 provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence. Rule 32 frames these issues by directing the probation officer to prepare a presentence report addressing all matters germane to the defendant's sentence. See Fed. Rule Crim. Proc. 32(c)(2).[2] At least 10 days before the sentencing, the report must be disclosed to the parties, see Rules 32(c)(3)(A), (C), whom the Guidelines contemplate will then be afforded an opportunity to file responses or objections with the district court, see Guidelines § 6A1.2, and official commentary.[3] Finally, Rule 32(a)(1) provides that "[a]t the sentencing hearing, the court [must] afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."

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[2] Pursuant to Rule 32(c)(2), the presentence report is to contain (a) information about the history and characteristics of the defendant, including his prior criminal record; (b) the classification of the offense and the defendant under the Sentencing Guidelines, possible sentencing ranges, and any factors that might warrant departure from the Guidelines; (c) any pertinent policy statements issued by the Sentencing Commission; (d) the impact of the defendant's offense upon any victims; (e) information relating to possible sentences not requiring incarceration, unless the court orders otherwise; and (f) any other information requested by the court.

[3] District courts have generally implemented this directive through local rules that allow the parties to file objections to the presentence report in advance of the sentencing hearing and that require the probation officer to respond to those objections. See, *e. g.*, U. S. Dist. Ct. for the MD Ala. Rules 33(a)–(c); U. S. Dist. Ct. for the D DC Rules 311(a)–(c); U. S. Dist. Ct. for the ND Fla. Gen. Rules 23(b)–(d); U. S. Dist. Ct. for the ND Ill. Crim. Rules 2.06(g)–(i); U. S. Dist. Ct. for the ED–MD–WD La. Rules 16M(a)–(c); U. S. Dist. Ct. for the D. Minn. Rules 83.10(c)–(d); U. S. Dist. Ct. for the EDNC Rules 50.03–50.05; U. S. Dist. Ct. for the ND Ohio Crim. Rules 10.05(2)(b)–(d); U. S. Dist. Ct. for the WD Okla. Rules 42(E)(1)–(3); U. S. Dist. Ct. for the ED Tenn. Rules 27.3–27.5; U. S. Dist. Ct. for the ND Tex. Rules 10.9(b)–(e); U. S. Dist. Ct. for the WD Va. Rules 14(1)–(3); U. S. Dist. Ct. for the D. Wyo. Rules 219(c)–(f).

This case involves one aspect of the procedures surrounding Guidelines sentencing: whether the defendant is entitled to notice before the district court departs *sua sponte* from the Guidelines sentencing range.[4] In the ordinary case, the presentence report or the Government's own recommendation will notify the defendant that an upward departure will be at issue and of the facts that allegedly support such a departure.[5] Here we deal with the extraordinary case in which the district court, on its own initiative and contrary to the expectations of both the defendant and the Government, decides that the factual and legal predicates for a departure are satisfied. The question before us is whether Congress, in enacting the Sentencing Reform Act, intended that the district court be free to make such a determination without notifying the parties. We believe that the answer to this question is clearly no.

B

As we have set forth, Rule 32 contemplates full adversary testing of the issues relevant to a Guidelines sentence and mandates that the parties be given "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. Rule Crim. Proc. 32(a)(1). Obviously, whether a *sua sponte* departure from the Guidelines would be legally and factually warranted is a "matte[r] relating to the appropriate sentence." In our view, it makes no sense to impute to Congress an intent that a defendant have the right *to comment* on the appropriateness of a *sua sponte* departure but not the

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[4] It is equally appropriate to frame the issue as whether the *parties* are entitled to notice before the district court departs upward *or* downward from the Guidelines range. Under Rule 32, it is clear that the defendant and the Government enjoy equal procedural entitlements.

[5] If the Government makes the recommendation in writing, Federal Rule of Criminal Procedure 49(a) requires that it be served upon the defendant.

right *to be notified* that the court is contemplating such a ruling.

In arguing that Rule 32 does not contemplate notice in such a situation, the Government derives decisive meaning from congressional silence. Rule 32(c)(3)(A), the Government observes, expressly obliges the district court to give the parties' 10 days' notice of the contents of the presentence report. Because Rule 32 does not contain a like provision expressly obliging the district court to announce that it is contemplating to depart *sua sponte*, the Government concludes that Congress must have intended to deny the parties any right to notice in this setting.

We find the Government's analysis unconvincing. As one court has aptly put it, "[n]ot every silence is pregnant." *State of Illinois Dept. of Public Aid* v. *Schweiker*, 707 F. 2d 273, 277 (CA7 1983). In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.

Here the textual and contextual evidence of legislative intent indicates that Congress did not intend district courts to depart from the Guidelines *sua sponte* without first affording notice to the parties. Such a reading is contrary to the text of Rule 32(a)(1) because it renders meaningless the parties' express right "to comment upon . . . matters relating to the appropriate sentence." "Th[e] right to be heard has little reality or worth unless one is informed" that a decision is contemplated. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). This is especially true when the decision in question is a *sua sponte* departure under the Guidelines. Because the Guidelines place essentially no limit on the number of potential factors that may warrant a depar-

ture, see, *e. g.*, Guidelines ch. 1, pt. A4(b), no one is in a position to guess when or on what grounds a district court might depart, much less to "comment" on such a possibility in a coherent way. The Government's construction of congressional "silence" would thus render what Congress has *expressly* said absurd. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 527 (1989) (SCALIA, J., concurring in judgment) (when "confronted . . . with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional result[,] [o]ur task is to give some alternative meaning [to the statute] . . . that avoids this consequence").

The inference that the Government asks us to draw from silence also is inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences. At best, under the Government's rendering of Rule 32, parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

Lastly, the meaning that the Government attaches to Congress' silence in Rule 32 is completely opposite to the meaning that this Court has attached to silence in a variety of analogous settings. Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice

and a meaningful opportunity to be heard. See *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 107–108 (1946) (statute permitting Securities and Exchange Commission to order corporate dissolution); *The Japanese Immigrant Case*, 189 U. S. 86, 99–101 (1903) (statute permitting exclusion of aliens seeking to enter United States). The Court has likewise inferred other statutory protections essential to assuring procedural fairness. See *Kent* v. *United States*, 383 U. S. 541, 557 (1966) (right to full, adversary-style representation in juvenile transfer proceedings); *Greene* v. *McElroy*, 360 U. S. 474, 495–508 (1959) (right to confront adverse witnesses and evidence in security-clearance revocation proceedings); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 48–51 (1950) (right to formal hearing in deportation proceedings).

In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause. Because Rule 32 does not clearly state that a district court *sua sponte* may depart upward from an applicable Guidelines sentencing range without providing notice to the defendant we decline to impute such an intention to Congress. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

III

We hold that before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify

the ground on which the district court is contemplating an upward departure.[6]

Petitioner did not receive the notice to which he was entitled under Rule 32. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE SOUTER, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, and with whom THE CHIEF JUSTICE joins as to Part I, dissenting.

The Court today imposes a procedural requirement neither contemplated by Congress nor warranted by the language of any statute or rule. The Court's inference of a notice requirement from congressional silence rests on a failure to appreciate the extraordinary detail with which the Sentencing Reform Act of 1984 (in amending Federal Rule of Criminal Procedure 32 and in its other provisions) expressly provides the procedures to be followed in imposing sentence in a federal criminal case. The absence from this carefully calibrated scheme of any provision for notice of the sort required by the Court makes it clear that, in the words the Court quotes, *ante*, at 136, the congressional silence was pregnant, and that Congress intended to require no such notice. The Court's interpretation of Rule 32 accomplishes "'not a construction of a [rule], but, in effect, an enlargement of it by the court.'" *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 101 (1991), quoting *Iselin* v. *United States*, 270 U. S. 245, 251 (1926) (Brandeis, J.). Because the Court's

[6] Because the question of the *timing* of the reasonable notice required by Rule 32 is not before us, we express no opinion on that issue. Rather, we leave it to the lower courts, which, of course, remain free to adopt appropriate procedures by local rule. See Guidelines § 6A1.2, and official commentary ("Courts should adopt procedures to provide for . . . the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing"). See also n. 3, *supra* (listing local rules established to govern resolution of objections to findings in presentence report).

creation cannot be justified as a reasonable construction of the Rule, I respectfully dissent.

I

The express procedural requirements of the Sentencing Reform Act are numerous. Unless the court makes findings that would justify dispensing with a presentence investigation, the probation officer must make a presentence report, Fed. Rule Crim. Proc. 32(c)(1), that includes, *inter alia*, "information about the history and characteristics of the defendant"; "the classification of the offense and of the defendant under the categories established by the Sentencing Commission . . . that the probation officer believes to be applicable to the defendant's case"; "the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission"; and "an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Fed. Rules Crim. Proc. 32(c)(2)(A) and (B).

The same Rule provides several guarantees of a defendant's right to address the court. At the sentencing hearing, the district court "shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Rule 32(a)(1). Before imposing sentence the court must "determine that the defendant and his counsel have had the opportunity to read and discuss" any presentence report and must afford the defendant and his counsel an opportunity to speak to the court and present mitigating information. Rule 32(a)(1)(A). Finally, the defendant and his counsel must be given the "opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information

relating to any alleged factual inaccuracy contained in it." Rule 32(c)(3)(A).

The report itself, "not including any final recommendation as to sentence," must in most respects be disclosed to the defendant, his counsel, and the attorney for the Government at least 10 days before sentencing, unless the defendant waives his right to that notice. Rules 32(c)(3)(A) and (C); 18 U. S. C. § 3552(d). Even when there is no full report, "[p]rior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case." Rule 32(a)(1).

The district court must sentence within the range set by the Guidelines, unless it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U. S. C. § 3553(b). A judge who departs from the Guidelines must "state in open court . . . the specific reason for the imposition of a sentence different from that described," § 3553(c)(2), and a sentence outside the applicable range may be appealed, §§ 3742(a)(3), (b)(3).

For all this attentive concern with procedure, neither Rule 32 nor any other provision of the Sentencing Reform Act expressly requires advance notice of a district court's intention to depart *sua sponte* from the Guidelines range. The Court contends that such a notice requirement is implicit in the provision of Rule 32(a)(1)[1] mandating that the parties be given

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[1] Rule 32(a)(1) provides:

"Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defend-

"an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." In the Court's view, the right to comment on a matter relating to sentencing, such as the possibility of upward departure, can be exercised effectively only when that "matter" is identified explicitly; accordingly, the argument runs, in providing an opportunity to comment Congress must also have intended to require that notice be given of any matter upon which the parties might desire to comment. See *ante*, at 136–137.

The difficulty with this reasoning is that the terms of the Act reflect a decided congressional disinclination to rely on presuppositions and silent intentions in place of explicit notice requirements. The Act expressly requires that before sentencing the court must give notice to the defense of the probation officer's determination of the sentencing classifications and Guidelines range applicable to the case. The Act

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ant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

"(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

"(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

"(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

"The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government."

also expressly entitles the defense to a copy of the presentence report not less than 10 days before the hearing (subject to qualifications not relevant here), and it expressly directs the court to ensure that the defendant and the defendant's counsel have had the opportunity to read and discuss the report before sentence is imposed.

What is remarkable about these provisions is that all of them (save for the guarantee of 10-day notice) would be superfluous on the Court's reasoning. It is fair to say, for example, that the right to comment not merely on the appropriate classifications and Guidelines range, but on the probation officer's determinations of what they are, implies a right to notice of those determinations. And yet Congress did not leave the notice requirement to the force of implication but expressly provided for it, both in cases with a presentence report and in cases without one. It would be only slightly less compelling to argue that a right to comment on other matters affecting sentence implies a right to read, discuss, and address the court with respect to the probation officer's report. And yet, again, the drafters of Rule 32 provided for this result, not by relying on implication but by specific mandates to disclose.

Given this congressional reliance on explicit provisions for disclosure even when notice requirements might reasonably have been inferred from rights to comment, there is great significance in the congressional silence about notice when a sentencing judge intends to depart from a Guidelines range. The only fair inference from this differential treatment is that when Congress meant to provide notice and disclosure, it was careful to be explicit, as against which its silence on the predeparture notice at issue here bespeaks no intent that notice be given. See, *e. g.*, *General Motors Corp.* v. *United States*, 496 U. S. 530, 541 (1990).

The Court seeks to justify its rewriting of Rule 32 by asserting that interpreting the Rule as written would be "absurd," because such an interpretation would "rende[r] mean-

ingless" the right to comment on "other matters relating to the appropriate sentence" conferred by the Rule. *Ante*, at 136–137. Even if we were authorized to embellish Congress' handiwork in the interest of enduing it with additional meaning, however, the Court's argument would fail on its own terms, for the Court's specific notice requirement is not necessary to save the right to comment from meaninglessness.

First, the phrase "other matters relating to the appropriate sentence" includes a wide variety of matters beyond the district court's possible inclination to depart *sua sponte*, such as the existence and significance of facts indicating the sentence that the court should choose within the applicable Guidelines range. Lack of specific notice as to just one "other matter" (the court's option to depart upward) does not render the entire phrase meaningless.

Second, even with regard to the "matter" of possible upward departure, the absence of specific notice hardly renders the opportunity to comment meaningless. The Court's contrary conclusion rests on its erroneous treatment of the absence of specific notice of the factors on which the court may rely as equivalent to a complete absence of notice that the court may depart. Because the Sentencing Reform Act provides that a court may depart from the applicable Guideline range if it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," 18 U. S. C. § 3553(b), the statute itself puts the parties on notice that departure is always a possibility, and the parties can use their opportunity to comment to address that possibility. Indeed, the record in this case demonstrates that, even without specific notice, counsel may choose to gear part of the argument to the possibility of departure. At the sentencing hearing, despite the absence of any indication that the judge was contemplating departure, petitioner's counsel closed his remarks to the court by asking

> "that the period of incarceration be limited enough that he has a family to return to, that he has a future that he can work towards rebuilding, *and we think the guidelines are the appropriate range, Your Honor. We ask Your Honor to consider a sentence within the guidelines.*" App. 45 (emphasis added).

Although specific notice of the sort required by the Court might be useful to the parties in helping them focus on specific potential grounds for departure, its absence hardly makes the opportunity to comment on the possibility of departure so meaningless as to justify judicial legislation. Although "we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof," *Astoria Federal Savings & Loan Assn.* v. *Solimino*, *ante*, at 112, it is not our practice to supplement their provisions simply because we think that some statutory provision might usefully do further duty than Congress has assigned to it.[2]

The Court also seeks to rely on the rule that statutes should be construed so as to avoid raising serious constitutional problems. *Ante*, at 138. This canon of construction, however, only applies when the constitutional difficulty can be avoided by a "'*reasonable* construction,'" *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988) (emphasis

[2] Although the Court stops short of explicitly relying on § 6A1.3 of the Sentencing Guidelines as providing textual support for a notice requirement, its lengthy quotation from the commentary to that provision, *ante*, at 133, bears mention. Section 6A1.3 addresses nothing more than disputes about factual matters like the presence or absence of particular offense and offender characteristics. Accordingly, the Introductory Commentary to Part A of Chapter Six of the Guidelines (of which § 6A1.3 is a part) states that "[t]his Part . . . sets forth the procedures for establishing the *facts* upon which the sentence will be based." (Emphasis added.) Because § 6A1.3 thus deals only with the resolution of fact-based disputes, it simply does not bear on the legal determination whether a given fact, once established, amounts to a circumstance so aggravating as to justify departure.

added), of the statute. The problem with the Court's notice requirement is that in no way does it result from a "construction" of anything in Rule 32. In light of the emphatic congressional silence about prior notice of *sua sponte* departures, what the Court does to Rule 32 comes closer to reconstruction than construction.

In any event, the canon applies only when a contrary construction would "raise serious constitutional problems." *Ibid.* Because, as I will now proceed to discuss, Rule 32 as written raises no such problems, there is no warrant for the Court's conclusion.[3]

II

I begin with the proposition that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion). At the threshold, of course, there must be an interest subject to due process protection, such as the expectancy that we found to have been created by the Nebraska statute at issue in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U. S. 1 (1979). The Act there in question directed that the parole board, when considering the possible release of an eligible prisoner, "'shall order his release unless it is of the opinion that his release should be deferred because'" one of four statutory criteria was met. *Id.*, at 11; see also *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 538–541 (1985); *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). The Sentencing Reform Act creates a similar presumption by providing that "[t]he court

[3]The Court's statement that we have "readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard," *ante*, at 137–138 (emphasis in original) (citing cases), is inapposite. The cases cited by the Court involved statutes that made no provision whatsoever for notice or hearing. By contrast, the Sentencing Reform Act itself, as explained earlier, gives notice that departure is always a possibility; and the express provisions of Rule 32 give the defendant the opportunity to be heard at his sentencing hearing.

shall impose a sentence of the kind, and within the range, [set forth in the Guidelines,] *unless* the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U. S. C. §3553(b) (emphasis added). I therefore conclude that a defendant enjoys an expectation subject to due process protection that he will receive a sentence within the presumptively applicable range in the absence of grounds defined by the Act as justifying departure.

The question is "what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). "'"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,'" *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961), but is "flexible[, calling] for such procedural protections as the particular situation demands." *Morrissey*, *supra*, at 481. The methodology for assessing those demands was the subject of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), where we prescribed a three-part enquiry to consider

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

Although *Mathews* itself concerned the adequacy of administrative factfinding procedures, we have not confined the *Mathews* approach to administrative contexts or to situations where simple factfinding is the sole determinant of governmental action. In *Parham* v. *J. R.*, 442 U. S. 584 (1979), for example, we addressed the constitutionality of Georgia's procedures for involuntarily admitting a child for treatment in a state mental hospital and explicitly relied on the *Mathews*

structure. *Id.*, at 599–600. We called it "a general approach for testing challenged state procedures under a due process claim," *id.*, at 599, even as we recognized that "[w]hile facts are plainly necessary for a proper resolution of [the relevant medical] questions, they are only a first step in the process," *id.*, at 609. In *Greenholtz*, we relied on *Mathews* while realizing that the parole board's decision was "necessarily subjective in part and predictive in part," that it entailed the exercise of "very broad discretion," 442 U. S., at 13, and that none of the statutory bases for denying parole was a mere issue of historical fact, see *id.*, at 11. In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), holding that due process did not require notice and a hearing before the infliction of corporal punishment, we applied *Mathews* even though the relevant "risk of error" was not merely that facts might be mistaken, but that apart from any factual mistake corporal punishment might be inflicted "unnecessarily or excessively." 430 U. S., at 678. The *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest, and I think that *Mathews* provides the right framework for the analysis here as well.

As for the first *Mathews* factor, a convicted defendant plainly has a lively concern with the consequences of an erroneous upward departure. In the present case, for example, petitioner's sentence of 60 months' imprisonment was double the low end of the recommended Guidelines range of 30 to 37 months. A defendant's interest in receiving a sentence not unlawfully higher than the upper limit of the Guidelines range is thus clearly substantial.

Neither, however, is the Government's interest at issue here an insignificant one. Although the Court does not decide when notice must be given, it seems likely that the Court's notice requirement will force a district court to postpone the imposition of sentence whenever the court decides

at or shortly before the sentencing hearing that upward departure should be considered. To avoid the possibility of such a postponement, a sentencing judge will need to schedule time well in advance of the sentencing hearing to identify and consider possible grounds for departure. Since the time spent on this advance review will not simply be recovered by subtracting it from the length of the subsequent sentencing hearing, the result will almost certainly be more time spent on a process already lengthened considerably by the new sentencing scheme. See Report of the Federal Courts Study Committee 137 (1990) (90 percent of judges in survey report that Guidelines have made sentencing more time consuming; 30 percent report an increase of at least 50 percent in time spent on sentencing). Thus, the Government has an important interest in avoiding the additional drain on judicial resources that the Court's notice requirement will impose on already overburdened district judges. Cf., *e. g.*, Advisory Committee's Notes on Fed. Rule Crim. Proc. 32, 18 U. S. C. App., p. 798 (declining to require sentencing judge to notify defendant of possible uses of presentence report, because "[t]he Committee believes that this additional burden should not be placed upon the trial judge").[4]

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[4] Although conceivably a district court might give predeparture notice at the sentencing hearing itself, without postponing sentencing pending a further hearing on the question of departure, such a practice would be of little use in reducing the risk of error in sentencing determinations. A contemporaneous warning of upward departure might sharpen defense counsel's rhetoric, but it would not be of much help in enabling him to present evidence on disputed facts he had not previously meant to contest, or in preparing him to address the legal issue of the adequacy of the Guidelines in reflecting a particular aggravating circumstance. Contemporaneous notice would, then, probably turn out to be more a formality than a substantive benefit.

While such contemporaneous notice (and any additional argument offered as a result) would be unlikely to add substantially to the length of a sentencing hearing, and, therefore, implicates only a modest Government interest in efficiency, even that modest interest is sufficient to balance the *de minimis* benefit of such notice to the defense. In view of the fact that,

With each party having substantial and contrary interests, great significance attaches to the second element in the *Mathews* analysis. I think it clear that both the risk of error under the procedures already required and the probable value of a further notice requirement are sufficiently low that the current sentencing scheme passes constitutional muster without the notice requirement imposed by the Court today.

The first of the possible sources of error that could infect a sentencing decision are the conclusions of fact thought by the sentencing judge to justify any upward departure. These factual propositions are, however, generally presented in the presentence report, and are subject to challenge and evidentiary resolution under Rule 32(c)(3)(A).[5] The practical adequacy of this chance to challenge any erroneous fact statements is not limited to any significant degree by lack of notice that the judge is considering departure from the Guidelines, since a defendant clearly is on notice that an unfavorably erroneous fact statement can do him serious harm by influencing the judge to sentence on the high end of the Guidelines range, even when the disquieting fact might not drive the judge to the point of considering departure from the range itself. No procedure beyond that of the existing law is therefore necessary to provide a defendant with a reason as well as an effective opportunity to minimize the risk of an upward departure resting on a mistake of fact relevant to sentencing.

A second source of possible sentencing error inheres in the interpretation and application of congressional sentencing authorization. Of course, under any codified sentencing scheme there will always be some risk, albeit normally a low

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as I explain below, existing procedures provide substantial protection against any risk of error, the minimal benefit of contemporaneous notice cannot be said to be a requirement of due process.

[5] I do not address whether due process would require notice prior to a decision by a sentencing judge to depart upward on the basis of facts not contained in the presentence report.

one, that a judge may stray beyond the outer limit of the sentence provided for the offense in question, in which event rehearing or appeal will allow for correction. There is, however, a potential for legal error peculiar to proceedings under the Sentencing Reform Act, in the provision that an aggravating or mitigating fact may justify departure from the otherwise applicable Guidelines range if that factual circumstance is not adequately reflected in the range chosen by the Commission. 18 U. S. C. § 3553(b). Because such an issue of adequate reflection goes essentially to the Commission's intentions, it has uniformly, and I believe correctly, been treated as an issue of law subject to customary appellate review.[6] Whether this appellate opportunity suffices for due process depends on whether the effectiveness of any appeal would be enhanced, or the probable need for appeal obviated, by requiring prior notice of the sentencing judge's intentions or concerns at the trial stage. I believe the answer is no.

If the issue of adequate reflection were one that called for evidentiary litigation by questioning witnesses about the Commissioners' thought processes, or by discovering or introducing documentary evidence that would otherwise be unavailable on appeal, then notice in time to litigate at the

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[6] Every Circuit except the Fifth has explicitly held, like the District of Columbia Circuit in this case, see 282 U. S. App. D. C. 194, 196, 893 F. 2d 1343, 1345 (1990), that "plenary" or "*de novo*" review is appropriate. See *United States* v. *Diaz-Villafane*, 874 F. 2d 43, 49 (CA1), cert. denied, 493 U. S. 862 (1989); *United States* v. *Lara*, 905 F. 2d 599, 602 (CA2 1990); *United States* v. *Ryan*, 866 F. 2d 604, 610 (CA3 1989); *United States* v. *Chester*, 919 F. 2d 896, 900 (CA4 1990); *United States* v. *Rodriguez*, 882 F. 2d 1059, 1067 (CA6 1989), cert. denied, 493 U. S. 1084 (1990); *United States* v. *Williams*, 901 F. 2d 1394, 1396 (CA7 1990), cert. pending, No. 90–5849; *United States* v. *Whitehorse*, 909 F. 2d 316, 318 (CA8 1990); *United States* v. *Singleton*, 917 F. 2d 411, 412 (CA9 1990); *United States* v. *Dean*, 908 F. 2d 1491, 1494 (CA10 1990); *United States* v. *Russell*, 917 F. 2d 512, 515 (CA11 1990), cert. denied, 499 U. S. 953 (1991). The Fifth Circuit has held that departure will be affirmed when the reasons for departure are "acceptable." See, *e. g.*, *United States* v. *Murillo*, 902 F. 2d 1169, 1172 (1990).

trial level would be indispensable, virtually as a matter of definition. But a district court's determination that an aggravating circumstance is "of a kind, or . . . a degree, not adequately taken into consideration by the Sentencing Commission," *ibid.*, is not subject to that sort of evidentiary proof. The legal issue of adequate reflection will turn not on an evidentiary record that might be developed at a sentencing hearing, but on documented administrative history and commentary that will be available to any defendant at the appellate stage.

Because a defendant thus has no need for evidentiary litigation, he has no need for notice of judicial intentions in order to focus the presentation of evidence. And while in some cases defense counsel might be able to affect a trial judge's initial view of the adequacy of a Guidelines range in reflecting an aggravating circumstance, the principal safeguard against serving extra time resulting from a mistake about the adequacy of the Guidelines will still be the safeguard available under the statute as now applied, an appeal of law. The opportunity for such a post-trial appeal therefore suffices to minimize the chance of any erroneous deprivation of liberty that might otherwise flow from the sort of legal error in question.[7]

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[7] There is one class of defendants for whom the right to appeal might not substitute for the ability to argue the issue to the district court: those for whom the Guidelines recommend either no incarceration or a period of incarceration shorter than the time necessary for the disposition of an appeal, but who receive a greater sentence in the exercise of the district court's authority to depart. For such a defendant, a successful appeal could come too late to undo completely the damage done by an erroneous departure decision. However, "a process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them." *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 330 (1985). There is no contention that this class of defendants is sufficiently large to affect the due process calculus in this case.

Finally, a decision to depart from the Guidelines includes a determination that some sentence more onerous than what the Guidelines would permit is not simply permissible, but is in fact appropriate for the particular offense by the particular defendant. See 18 U. S. C. §3553(b). In assessing the due process implications of this element of the sentencing decision, it is worth pausing to identify the nature of the error that could occur when a judge makes the ultimate decision about a sentence's duration.

The concept of error in a sentence's factual predicate is fairly obvious, and legal error in assessing the conclusiveness of a Guidelines range, in the sense in which I have just explained it, is equally straightforward. Error in fixing the duration of a sentence outside the Guidelines range, however, must be understood in terms of the discretionary nature of the judicial function in making that decision.

Such a judgment about what the defendant deserves is discretionary in the sense that its underlying premises of fact, law, and value cannot be so quantified, or stated with such precision, as to require a sentencing court to reach one conclusion and one only. There is, rather, a spectrum of sentences that are arguably appropriate or reasonable, cf. *Wasman* v. *United States*, 468 U. S. 559, 563 (1984) (under pre-Guidelines law, sentencing judge has wide discretion within range permitted by statute); *United States* v. *Tucker*, 404 U. S. 443, 446–447 (1972) (same), and error in discretionary sentencing must therefore be identified as a failure to impose a sentence that actually falls within this zone of reasonableness.

The Act provides two procedures to minimize the risk that a defendant will be forced to serve a sentence outside the Guidelines range that is unreasonably long. The first, of course, is the opportunity at the sentencing hearing itself to address the court, apprised by the Guidelines that departure is always possible. As I have noted earlier, even without express notice, counsel may choose to gear part of his argu-

ment to the possibility that departure is on the judge's mind. Petitioner's counsel understood that possibility when he contended that "the guidelines are the appropriate range" and asked the court "to consider a sentence within the guidelines." App. 45. For that matter, even if counsel chooses not to argue against departure specifically, pleas for leniency within the Guidelines range often duplicate the arguments that can be made against upward departure. A defendant thus has both opportunity and motive to make appropriate arguments before the trial judge renders any final decision, even without predeparture notice. Cf. *Loudermill*, 470 U. S., at 543 (even where facts are clear, appropriate action may not be).

The second procedure available to minimize the risk of serving an unreasonable sentence is appellate review of the sentence itself. "If the court of appeals determines that the sentence . . . is outside the applicable guideline range and is unreasonable . . . [and] too high . . . it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate." 18 U. S. C. § 3742(f)(2)(A). While this right to review is only as good as the record that a defendant can present to an appellate court, prehearing notice of a sentencing judge's intentions will not likely enhance the record for the defendant's benefit. A defendant already has the opportunity and impetus to challenge the factual predicate on which a sentence must stand or fall as reasonable or not. And since the comprehensive factual predicate is supplemented by the sentencing judge's statement of reasons for departing from the Guidelines, see § 3553(c), it is difficult to imagine how the record could be more conducive to a comprehensive review of a defendant's claim that his sentence outside the Guidelines range is unreasonably high.

It is, indeed, just the substantiality of this appeal right that indicates why predeparture notice lies beyond the scope of what due process demands. For if there can be said to be

any need for the sort of exact predeparture notice that the Court requires, it does not arise from the risk that a defendant will be forced to serve a sentence that is erroneous by virtue of an unreasonable exercise of discretion. Rather, any incremental advantage that a defendant might obtain from advance knowledge of the judge's thinking will most likely consist of allowing the defendant to be more precise in trying to influence a judge's exercise of discretion within the range of reasonableness that the law allows. The defendant's further advantage, if any, will not be a reduced risk of serving an unreasonable sentence, but an improved opportunity to tailor an exact argument about where the sentence should be set within the reasonable zone. Although the reality of any such advantage that might flow from knowing the judge's mind may be debatable, a defendant's desire for it is nothing new. Litigants have always desired greater opportunities to influence courts in the exercise of discretion within permissible limits. And yet it comes as no surprise that in the days before the Sentencing Reform Act due process was not thought to require the notice and arguably enhanced opportunity that the Court today requires. See *Greenholtz*, 442 U. S., at 16. It comes as no surprise simply because the reason that due process imposed no such notice requirement then is the same that it imposes none today: such notice is not in practice necessary to reduce the risk of serving erroneous sentences. Cf. *Dixon* v. *Love*, 431 U. S. 105, 114 (1977).

In sum, existing process provides what is due without resort to the Court's requirement. This conclusion echoes our treatment in *Greenholtz* of an inmate's liberty interest in early parole, an interest comparable to that of petitioner in a shorter sentence. The Court of Appeals in *Greenholtz* had required the parole board to provide inmates eligible for parole with "written notice reasonably in advance of the hearing together with a list of factors that might be considered." 442 U. S., at 14, n. 6. We decided that due process required no such notice, and held that it would suffice for the board to

"infor[m] the inmate in advance of the month during which the hearing will be held . . . [and] on the day of the hearing . . . pos[t] notice of the exact time," even though the board's notice would not include a list of factors on which the board might rely. *Ibid.* The notice now required by the Court closely resembles the "list of factors" we rejected as constitutionally unnecessary in *Greenholtz*.

I do not suggest that the specific notice required by the Court cannot be justified on grounds of policy. There is, however, nothing in the Sentencing Reform Act or the Due Process Clause that provides a basis for today's holding.

I respectfully dissent.

TOIBB *v.* RADLOFF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90–368. Argued April 22, 1991—Decided June 13, 1991

Petitioner Toibb filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, disclosing, *inter alia*, assets that included stock in an electric power company. When he discovered that the stock had substantial value, he decided to avoid its liquidation by moving to convert his Chapter 7 case to one under Chapter 11's reorganization provisions. After the Bankruptcy Court granted his motion, and he filed his reorganization plan, that court dismissed his petition, finding that he did not qualify for relief under Chapter 11 because he was not engaged in an ongoing business. The District Court and the Court of Appeals affirmed.

Held: The Bankruptcy Code's plain language permits individual debtors not engaged in business to file for relief under Chapter 11. Toibb is a debtor within the meaning of § 109(d), which provides that "a person who may be a debtor under chapter 7 . . . except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11." He is a person who may be a Chapter 7 debtor, since only railroads and various financial and insurance institutions are excluded from Chapter 7's coverage, and § 109(d) makes Chapter 11 available to all entities eligible for Chapter 7 protection, other than stockbrokers and commodities brokers. Although Chapter 11's structure and legislative history indicate that it was intended primarily for the use of business debtors, the Code contains no ongoing business requirement for Chapter 11 reorganization; and there is no basis, including underlying policy considerations, for imposing one. Pp. 160–166.

902 F. 2d 14, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 166.

Peter M. Lieb argued the cause for petitioner. With him on the briefs were *Timothy B. Dyk* and *Jonathan W. Belsky*.

Stephen J. Marzen argued the cause for the United States, as respondent under this Court's Rule 12.4, in support of petitioner. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor*

General Roberts, *William Kanter*, *Bruce G. Forrest*, and *Martha Davis*.

James Hamilton, by invitation of the Court, 498 U. S. 1065, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must decide whether an individual debtor not engaged in business is eligible to reorganize under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*

I

From March 1983 until April 1985, petitioner Sheldon Baruch Toibb, a former staff attorney with the Federal Energy Regulatory Commission, was employed as a consultant by Independence Electric Corporation (IEC), a company he and two others organized to produce and market electric power. Petitioner owns 24 percent of the company's shares. After IEC terminated his employment, petitioner was unable to find work as a consultant in the energy field; he has been largely supported by his family and friends since that time.

On November 18, 1986, petitioner filed in the United States Bankruptcy Court for the Eastern District of Missouri a voluntary petition for relief under Chapter 7 of the Code, 11 U. S. C. § 701 *et seq.* The Schedule of Assets and Liabilities accompanying petitioner's filing disclosed no secured debts, a disputed federal tax priority claim of $11,000, and unsecured debts of $170,605.[1] Petitioner listed as nonexempt assets his IEC shares and a possible claim against his former business associates. He stated that the market value of each of these assets was unknown.

On August 6, 1987, the Chapter 7 trustee appointed to administer petitioner's estate notified the creditors that the

[1] Because petitioner's unsecured debts exceeded $100,000 and he had no regular income, he was ineligible to proceed under Chapter 13 of the Code, 11 U. S. C. § 1301 *et seq.* See § 109(e).

Board of Directors of IEC had offered to purchase petitioner's IEC shares for $25,000. When petitioner became aware that this stock had such value, he decided to avoid its liquidation by moving to convert his Chapter 7 case to one under the reorganization provisions of Chapter 11.

The Bankruptcy Court granted petitioner's conversion motion, App. 21, and on February 1, 1988, petitioner filed a plan of reorganization. *Id.*, at 70. Under the plan, petitioner proposed to pay his unsecured creditors $25,000 less administrative expenses and priority tax claims, a proposal that would result in a payment of approximately 11 cents on the dollar. He further proposed to pay the unsecured creditors, for a period of six years, 50 percent of any dividends from IEC or of any proceeds from the sale of the IEC stock, up to full payment of the debts.

On March 8, 1988, the Bankruptcy Court on its own motion ordered petitioner to show cause why his petition should not be dismissed because petitioner was not engaged in business and, therefore, did not qualify as a Chapter 11 debtor. *Id.*, at 121. At the ensuing hearing, petitioner unsuccessfully attempted to demonstrate that he had a business to reorganize.[2] Petitioner also argued that Chapter 11 should be available to an individual debtor not engaged in an ongoing business. On August 1, the Bankruptcy Court ruled that, under the authority of *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F. 2d 503 (CA8 1986), petitioner failed to qualify for relief under Chapter 11. App. to Pet. for Cert. A–17 and A–19.

The United States District Court for the Eastern District of Missouri, also relying on *Wamsganz*, upheld the Bankruptcy Court's dismissal of petitioner's Chapter 11 case. App. to Pet. for Cert. A–8 and A–9. The United States Court of Appeals for the Eighth Circuit affirmed, holding that the Bankruptcy Court had the authority to dismiss the

[2] Petitioner does not seek further review of the question whether he is engaged in an ongoing business.

proceeding *sua sponte*, and that the Circuit's earlier *Wamsganz* decision was controlling. *In re Toibb*, 902 F. 2d 14 (1990).[3] Because the Court of Appeals' ruling that an individual nonbusiness debtor may not reorganize under Chapter 11 clearly conflicted with the holding of the Court of Appeals for the Eleventh Circuit in *In re Moog*, 774 F. 2d 1073 (1985), we granted certiorari to resolve the conflict.[4] 498 U. S. 1060 (1991).

II

A

In our view, the plain language of the Bankruptcy Code disposes of the question before us. Section 109, 11 U. S. C. § 109, defines who may be a debtor under the various chapters of the Code. Section 109(d) provides: "Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title." Section 109(b) states: "A person may be a debtor under chapter 7 of this title only if such person is not—(1) a railroad; (2) a domestic insurance company, bank, . . . ; or (3) a foreign insurance company, bank, . . . engaged in such business in the United States."

[3] The Eighth Circuit also agreed with what it regarded as the supporting precedent of *In re Little Creek Development Co.*, 779 F. 2d 1068 (CA5 1986), and *In re Winshall Settlor's Trust*, 758 F. 2d 1136 (CA6 1985).

[4] The named respondent, Stuart J. Radloff, was dismissed as Chapter 7 trustee when the Bankruptcy Court converted petitioner's case to one under Chapter 11. Mr. Radloff did not participate in the proceedings before the Court of Appeals and refrained from responding to Mr. Toibb's petition for certiorari filed with this Court. We therefore specifically requested the United States Trustee, see 28 U. S. C. § 581(a)(13), to respond. In doing so, the United States Trustee indicated his agreement with petitioner's position and suggested that, if this Court decided to review the case, it might wish to appoint counsel to defend the Eighth Circuit's judgment. We then invited James Hamilton, Esq., of Washington, D. C., a member of the Bar of this Court, to serve as *amicus curiae* in support of the judgment of the Court of Appeals. 498 U. S. 1065 (1991). Mr. Hamilton accepted this appointment and has well fulfilled this assigned responsibility.

The Code defines "person" as used in Title 11 to "includ[e] [an] individual." § 101(35). Under the express terms of the Code, therefore, petitioner is "a person who may be a debtor under chapter 7" and satisfies the statutory requirements for a Chapter 11 debtor.

The Code contains no ongoing business requirement for reorganization under Chapter 11, and we are loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11, because Congress took care in § 109 to specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code. Section 109(b) expressly excludes from the coverage of Chapter 7 railroads and various financial and insurance institutions. Only municipalities are eligible for the protection of Chapter 9. § 109(c). Most significantly, § 109(d) makes stockbrokers and commodities brokers ineligible for Chapter 11 relief, but otherwise leaves that Chapter available to any other entity eligible for the protection of Chapter 7. Congress knew how to restrict recourse to the avenues of bankruptcy relief; it did not place Chapter 11 reorganization beyond the reach of a nonbusiness individual debtor.

B

The *amicus curiae* in support of the Court of Appeals' judgment acknowledges that Chapter 11 does not expressly exclude an individual nonbusiness debtor from its reach. He echoes the reasoning of those courts that have engrafted an ongoing-business requirement onto the plain language of § 109(d) and argues that the statute's legislative history and structure make clear that Chapter 11 was intended for business debtors alone. See, *e. g.*, *Wamsganz* v. *Boatmen's Bank of De Soto*, 804 F. 2d, at 505 ("The legislative history of the Bankruptcy Code, taken as a whole, shows that Congress meant for chapter 11 to be available to businesses and persons engaged in business, and not to consumer debtors"). We find these arguments unpersuasive for several reasons.

First, this Court has repeated with some frequency: "Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum* v. *Stenson*, 465 U. S. 886, 896 (1984). The language of § 109 is not unclear. Thus, although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here.

Second, even were we to consider the sundry legislative comments urged in support of a congressional intent to exclude a nonbusiness debtor from Chapter 11, the scant history on this precise issue does not suggest a "clearly expressed legislative inten[t] . . . contrary . . ." to the plain language of § 109(d). See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The *amicus* does point to the following statement in a House Report:

> "Some consumer debtors are unable to avail themselves of the relief provided under chapter 13. For these debtors, straight bankruptcy is the only remedy that will enable them to get out from under the debilitating effects of too much debt." H. R. Rep. No. 95–595, p. 125 (1977).

Petitioner responds with the following excerpt from a later Senate Report:

> "Chapter 11, Reorganization, is primarily designed for businesses, although individuals are eligible for relief under the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context." S. Rep. No. 95–989, p. 3 (1978).

These apparently conflicting views tend to negate the suggestion that the Congress enacting the current Code operated with a clear intent to deny Chapter 11 relief to an individual nonbusiness debtor.

Finally, we are not persuaded by the contention that Chapter 11 is unavailable to a debtor without an ongoing business because many of the Chapter's provisions do not apply to a nonbusiness debtor. There is no doubt that Congress intended that a business debtor be among those who might use Chapter 11. Code provisions like the ones authorizing the appointment of an equity security holders' committee, § 1102, and the appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . . ," § 1104(a)(1), certainly are designed to aid in the rehabilitation of a business. It does not follow, however, that a debtor whose affairs do not warrant recourse to these provisions is ineligible for Chapter 11 relief. Instead, these provisions—like the references to debtor businesses in the Chapter's legislative history—reflect an understandable expectation that Chapter 11 would be used *primarily* by debtors with ongoing businesses; they do not constitute an additional prerequisite for Chapter 11 eligibility beyond those established in § 109(d).

III

Although the foregoing analysis is dispositive of the question presented, we deal briefly with *amicus'* contention that policy considerations underlying the Code support inferring a congressional intent to preclude a nonbusiness debtor from reorganizing under Chapter 11. First, it is said that bringing a consumer debtor within the scope of Chapter 11 does not serve Congress' purpose of permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors. This argument assumes that Congress had a single purpose in enacting Chapter 11. Petitioner suggests, however, and we agree, that Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate. See *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U. S. 343, 351–354 (1985). Under certain

circumstances a consumer debtor's estate will be worth more if reorganized under Chapter 11 than if liquidated under Chapter 7. Allowing such a debtor to proceed under Chapter 11 serves the congressional purpose of deriving as much value as possible from the debtor's estate.

Second, *amicus* notes that allowing a consumer debtor to proceed under Chapter 11 would permit the debtor to shield both disposable income and nonexempt personal property. He argues that the legislative history of Chapter 11 does not reflect an intent to offer a consumer debtor more expansive protection than he would find under Chapter 13, which does not protect disposable income, or Chapter 7, which does not protect nonexempt personal assets. As an initial matter, it makes no difference whether the legislative history affirmatively reflects such an intent, because the plain language of the statute allows a consumer debtor to proceed under Chapter 11. Moreover, differences in the requirements and protections of each chapter reflect Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code.

Amicus does not contend that allowing a consumer debtor to reorganize under Chapter 11 will leave the debtor's creditors in a worse position than if the debtor were required to liquidate. See Tr. of Oral Arg. 29–31. Nor could he. Section 1129(a)(7) provides that a reorganization plan may not be confirmed unless all the debtor's creditors accept the plan or will receive not less than they would receive under a Chapter 7 liquidation. Because creditors cannot be expected to approve a plan in which they would receive less than they would from an immediate liquidation of the debtor's assets, it follows that a Chapter 11 reorganization plan usually will be confirmed only when creditors will receive at least as much as if the debtor were to file under Chapter 7. Absent some showing of harm to the creditors of a nonbusiness debtor allowed to reorganize under Chapter 11, we see nothing in the

allocation of "burdens" and "benefits" of Chapter 11 that warrants an inference that Congress intended to exclude a consumer debtor from its coverage. See Herbert, Consumer Chapter 11 Proceedings: Abuse or Alternative?, 91 Com. L. J. 234, 245–248 (1986).

Amicus also warns that allowing consumer debtors to proceed under Chapter 11 will flood the bankruptcy courts with plans of reorganization that ultimately will prove unworkable. We think this fear is unfounded for two reasons. First, the greater expense and complexity of filing under Chapter 11 likely will dissuade most consumer debtors from seeking relief under this Chapter. See S. Rep. No. 95–989, at 3; see also Herbert, *supra*, at 242–243. Second, the Code gives bankruptcy courts substantial discretion to dismiss a Chapter 11 case in which the debtor files an untenable plan of reorganization. See §§ 1112(b) and 1129(a).

Finally, *amicus* asserts that extending Chapter 11 to consumer debtors creates the risk that these debtors will be forced into Chapter 11 by their creditors under § 303(a), a result contrary to the intent reflected in Congress' decision to prevent involuntary bankruptcy proceedings under Chapter 13. In particular, he suggests that it would be unwise to force a debtor into a Chapter 11 reorganization, because an involuntary debtor would be unlikely to cooperate in the plan of reorganization—a point that Congress noted in refusing to allow involuntary Chapter 13 proceedings. See H. R. Rep. No. 95–595, at 120.

We find these concerns overstated in light of the Code's provisions for dealing with recalcitrant Chapter 11 debtors. If an involuntary Chapter 11 debtor fails to cooperate, this likely will provide the requisite "cause" for the bankruptcy court to convert the Chapter 11 case to one under Chapter 7. See § 1112(b). In any event, the argument overlooks Congress' primary concern about a debtor's being forced into bankruptcy under Chapter 13: that such a debtor, whose future wages are not exempt from the bankruptcy estate,

§ 1322(a)(1), would be compelled to toil for the benefit of creditors in violation of the Thirteenth Amendment's involuntary servitude prohibition. See H. R. Rep. No. 95–595, at 120. Because there is no comparable provision in Chapter 11 requiring a debtor to pay future wages to a creditor, Congress' concern about imposing involuntary servitude on a Chapter 13 debtor is not relevant to a Chapter 11 reorganization.

IV

The plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11. Although the structure and legislative history of Chapter 11 indicate that this Chapter was intended primarily for the use of business debtors, the Code contains no "ongoing business" requirement for Chapter 11 reorganization, and we find no basis for imposing one. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Court's reading of the statute is plausible. It is supported by the omission of any prohibition against the use of Chapter 11 by consumer debtors and by the excerpt from the introduction to the Senate Report, quoted *ante*, at 162. Nevertheless, I am persuaded that the Court's reading is incorrect. Two chapters of the Bankruptcy Code—Chapter 7, entitled "Liquidation," 11 U. S. C. § 701 *et seq.*, and Chapter 13, entitled "Adjustment of Debts of an Individual With Regular Income," § 1301 *et seq.*—unquestionably and unambiguously authorize relief for individual consumer debtors. Chapter 11, entitled "Reorganization," § 1101 *et seq.*, was primarily designed to provide relief for corporate debtors but also unquestionably authorizes relief for individual proprietors of business enterprises. When the statute is read as a whole, however, it seems quite clear that Congress did not

intend to authorize a "reorganization" of the affairs of an individual consumer debtor.

Section 109(d) places a limit on the class of persons who may be a debtor under Chapter 11, but it does not state that all members of that class are eligible for Chapter 11 relief.[1] It states that "*only* a person that may be a debtor under Chapter 7 . . . may be a debtor under Chapter 11 . . . ." (Emphasis added.) It does not, however, state that *every* person entitled to relief under Chapter 7 is also entitled to relief under Chapter 11. In my judgment, the word "only" introduces sufficient ambiguity to justify a careful examination of other provisions of the Act, as well as the legislative history.

This examination convinces me that consumer debtors may not avail themselves of Chapter 11. The repeated references to the debtor's "business,"[2] "the operation of the debtor's business,"[3] and the "current or former management of the debtor"[4] make it abundantly clear that the principal focus of the chapter is upon business reorganizations. This conclusion is confirmed by the discussion of Chapter 11 in the Senate Report, which describes the provision as a "chapter for *business* reorganization" and repeatedly refers to a "business" as the subject of Chapter 11 relief.[5] See also 124

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[1] Section 109(d) provides:

"*Only* a person that may be a debtor under chapter 7 of this title, except a stockholder or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title." 11 U. S. C. § 109(d) (emphasis added).

[2] See, *e. g.*, §§ 1101(2)(B), 1108.

[3] See, *e. g.*, §§ 1103(c)(2), 1105, 1106(a)(3).

[4] See § 1104(b).

[5] The Senate Report contains the following explanation of Chapter 11 reorganizations:

"Chapter 11 deals with the reorganization of a financially distressed business enterprise, providing for its rehabilitation by adjustment of its debt obligations and equity interests. It should be distinguished from the bankruptcy liquidation under chapter 7 or the adjustment of the debts of an individual with regular income under chapter 13.

"Chapter 11 replaces chapters X, XI and XII of the Bankruptcy Act, Chapter 11 also includes special provisions for railroads in view of the im-

Cong. Rec. 34007 (1978) (Chapter 11 is a "consolidated approach to business rehabilitation") (statement of Sen. DeConcini).

The House Report, however, is more significant because it emphasizes the relationship between different chapters of the Code. The Report unambiguously states that a Chapter 7 liquidation is "the only remedy" for "consumer debtors [who] are unable to avail themselves of the relief provided under chapter 13." H. R. Rep. No. 95–595, p. 125 (1977). See also 124 Cong. Rec., at 32392, 32405 (Chapter 11 is "a consolidated approach to business rehabilitation" and a "new commercial reorganization chapter") (statement of Rep. Edwards). The accuracy of the statement in the House Report

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pact of regulatory laws on railroad debtors and replaces section 77 of the Bankruptcy Act. A single chapter for all business reorganizations will simplify the law by eliminating unnecessary differences in detail that are inevitable under separately administered statutes.

"Business reorganizations have been governed principally by chapters X and XI, both of which have been adopted by the Congress as part of the bankruptcy reforms in 1938. These chapters were not intended to be alternate paths of reorganization; they were to be mutually exclusive. Chapter X was meant for the reorganization of public companies and chapter XI for the rehabilitation of small and privately owned businesses.

"That schematic design was well conceived, but flawed somewhat by the failure to include a definition of a 'public company.' As a result, considerable litigation developed, mostly on the initiative of the Securities and Exchange Commission, over whether a case belonged in chapter X or chapter XI. This issue came to the Supreme Court in three cases, the last one in *SEC* v. *American Trailer Rentals, Inc.*, 379 U. S. 594 (1965), but the Court did not enunciate a hard-and-fast rule for all cases. Although it announced some guidelines, management and creditors of large public companies have continued to resort to chapter XI.

"The single chapter for business reorganization, which the bill provides, will eliminate unprofitable litigation over the preliminary issue as to which of the two chapters apply. . . .

"Reorganization, in its fundamental aspects, involves the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors and stockholders." S. Rep. No. 95–989, pp. 9–10 (1978).

is confirmed by a comparison of the text of Chapter 11 with the text of Chapter 13.

Above, I noted the striking difference between the chapter titles—"Reorganization" for Chapter 11 as opposed to "Adjustment of Debts of an Individual With Regular Income" for Chapter 13. Also significant is the conspicuous omission from Chapter 11 of both an important limit and an important protection included in Chapter 13. Chapter 13 relief is only available to individuals whose unsecured debts amount to less than $100,000 and whose secured debts are less than $350,000. See 11 U. S. C. § 109(e). Chapter 11 contains no comparable limit. Congress would have accomplished little in imposing this limit on the adjustment of individual consumer debt through Chapter 13 if Congress at the same time allowed the individual to avoid the limitation by filing under Chapter 11.[6]

More important, the Code expressly provides that involuntary proceedings can only be instituted under Chapter 7 and Chapter 11. See 11 U. S. C. § 303(a). A creditor therefore may not force an individual consumer debtor into an involuntary Chapter 13 proceeding. Under the Court's reading of the Act, however, a creditor could institute an involuntary proceeding under Chapter 11 against any individual with regular income. It seems highly unlikely that Congress intended to subject individual consumer debtors, such as pensioners, to involuntary Chapter 11 proceedings while at the same time prohibiting involuntary Chapter 13 proceedings against the same class of debtors.

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[6] Although the Court believes that permitting consumer debtors to avail themselves of Chapter 11 will not adversely affect their creditors, *ante*, at 164–165, I am not so sure. It takes time and money to determine whether a plan will provide creditors with benefits equal to those available through liquidation and still more time and money to find out whether such a predictive decision turns out to be correct or incorrect. The "complex" Chapter 11 process, see S. Rep. No. 95–989, p. 3 (1978), will almost certainly consume more time and resources than the simpler Chapter 7 procedures.

For these reasons, notwithstanding the excerpt from the Senate Report on which the Court relies, I would, in accordance with the clear statement in the House Report, read the statute as a whole to limit Chapter 11 relief to business debtors. I therefore respectfully dissent.

McNEIL *v.* WISCONSIN

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 90–5319. Argued February 26, 1991—Decided June 13, 1991

Charged with an armed robbery in West Allis, Wisconsin, petitioner McNeil was represented by a public defender at a bail hearing. While in jail on that charge, he was questioned by police about a murder and related crimes in Caledonia, Wisconsin. He was advised of his *Miranda* rights, signed forms waiving them, and made statements incriminating himself in the Caledonia offenses. He was then formally charged with the latter crimes, his pretrial motion to suppress his statements was denied, and he was convicted. His conviction was affirmed on appeal, the State Supreme Court holding that an accused's request for counsel at an initial appearance on a charged offense does not constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses.

Held: An accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda* v. *Arizona*, 384 U. S. 436, from the Fifth Amendment's guarantee against compelled self-incrimination. Pp. 175–182.

(a) The identity between the two rights that McNeil asserts is false as a matter of fact. The Sixth Amendment right, which does not attach until the initiation of adversary judicial proceedings, is offense specific, *Maine* v. *Moulton*, 474 U. S. 159, 179–180, and n. 16, as is its effect, under *Michigan* v. *Jackson*, 475 U. S. 625, of invalidating subsequent waivers during police-initiated questioning. Thus McNeil's invocation of that right with respect to the West Allis robbery poses no bar to the admission of his statements regarding the Caledonia crimes, with which he had not been charged at the time he made the statements. Moreover, although the *Miranda* right to counsel is nonoffense specific, *Arizona* v. *Roberson*, 486 U. S. 675, and, once asserted, prevents any further police-initiated interrogation outside the presence of counsel, *Edwards* v. *Arizona*, 451 U. S. 477, 484–485, its assertion cannot be inferred from the invocation of the Sixth Amendment right in light of the differing purposes and effects of the two rights. The Sixth Amendment right is intended to protect the unaided layman at critical confrontations with the government after the initiation of the adversary process with respect to a particular crime, *United States* v. *Gouveia*, 467 U. S. 180, 189. The *Miranda-Edwards* guarantee is intended to protect the sus-

pect's "desire to deal with the police only through counsel," *Edwards*, *supra*, at 484. Requesting the assistance of an attorney at a bail hearing does not satisfy the minimum requirement of some statement that can reasonably be construed as an expression of a desire for counsel in dealing with custodial interrogation by the police. Pp. 175–180.

(b) Nor will this Court declare as a matter of sound policy (assuming the existence of such expansive power) that assertion of the Sixth Amendment right implies invocation of the *Miranda* right. McNeil's proposed rule offers only insignificant advantages and would seriously impede effective law enforcement by precluding uncounseled but uncoerced admissions of guilt pursuant to valid *Miranda* waivers. Pp. 180–182.

155 Wis. 2d 24, 454 N. W. 2d 742, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 183. STEVENS, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 183.

Gary M. Luck, by appointment of the Court, 498 U. S. 979, argued the cause and filed briefs for petitioner.

David J. Becker, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *James E. Doyle*, Attorney General.

Stephen L. Nightingale argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, *Robert A. Long, Jr.*, and *Nina Goodman*.*

*Briefs of *amici curiae* urging affirmance were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, *Richard E. Doran*, and *Virlindia Doss*, Assistant Attorney General, and by the Attorneys General and other officials for their respective States as follows: *John K. Van de Kamp*, Attorney General of California, *John J. Kelly*, Chief State's Attorney of Connecticut, *Linley E. Pearson*, Attorney General of Indiana, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *William C. Webster*, Attorney General of Missouri, *T. Travis Medlock*, Attorney General of South Carolina, *Mark W. Barnett*, Attorney General of South Dakota, *R. Paul Van Dam*, Attorney General of Utah, and *Joseph B. Meyer*, Attorney General of Wyoming; for the State of Illinois by *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, and

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding constitutes an invocation of his *Miranda* right to counsel.

I

Petitioner Paul McNeil was arrested in Omaha, Nebraska, in May 1987, pursuant to a warrant charging him with an armed robbery in West Allis, Wisconsin, a suburb of Milwaukee. Shortly after his arrest, two Milwaukee County deputy sheriffs arrived in Omaha to retrieve him. After advising him of his *Miranda* rights, the deputies sought to question him. He refused to answer any questions, but did not request an attorney. The deputies promptly ended the interview.

Once back in Wisconsin, petitioner was brought before a Milwaukee County Court Commissioner on the armed robbery charge. The Commissioner set bail and scheduled a preliminary examination. An attorney from the Wisconsin Public Defender's Office represented petitioner at this initial appearance.

Later that evening, Detective Joseph Butts of the Milwaukee County Sheriff's Department visited petitioner in jail. Butts had been assisting the Racine County, Wisconsin, police in their investigation of a murder, attempted murder, and armed burglary in the town of Caledonia; petitioner was a suspect. Butts advised petitioner of his *Miranda* rights, and petitioner signed a form waiving them. In this

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Terrence M. Madsen, Assistant Attorney General; and for the Appellate Committee of the California District Attorneys Association by *Jay P. Dufrechou*.

Gregory U. Evans, *Daniel B. Hales*, *George D. Webster*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement et al. as *amici curiae*.

first interview, petitioner did not deny knowledge of the Caledonia crimes, but said that he had not been involved.

Butts returned two days later with detectives from Caledonia. He again began the encounter by advising petitioner of his *Miranda* rights and providing a waiver form. Petitioner placed his initials next to each of the warnings and signed the form. This time, petitioner admitted that he had been involved in the Caledonia crimes, which he described in detail. He also implicated two other men, Willie Pope and Lloyd Crowley. The statement was typed up by a detective and given to petitioner to review. Petitioner placed his initials next to every reference to himself and signed every page.

Butts and the Caledonia Police returned two days later, having in the meantime found and questioned Pope, who convinced them that he had not been involved in the Caledonia crimes. They again began the interview by administering the *Miranda* warnings and obtaining petitioner's signature and initials on the waiver form. Petitioner acknowledged that he had lied about Pope's involvement to minimize his own role in the Caledonia crimes and provided another statement recounting the events, which was transcribed, signed, and initialed as before.

The following day, petitioner was formally charged with the Caledonia crimes and transferred to that jurisdiction. His pretrial motion to suppress the three incriminating statements was denied. He was convicted of second-degree murder, attempted first-degree murder, and armed robbery, and sentenced to 60 years in prison.

On appeal, petitioner argued that the trial court's refusal to suppress the statements was reversible error. He contended that his courtroom appearance with an attorney for the West Allis crime constituted an invocation of the *Miranda* right to counsel, and that any subsequent waiver of that right during police-initiated questioning regarding *any* offense was invalid. Observing that the State's Supreme

Court had never addressed this issue, the Court of Appeals certified to that court the following question:

> "Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses?" App. 16.

The Wisconsin Supreme Court answered "no." 155 Wis. 2d 24, 454 N. W. 2d 742 (1990). We granted certiorari, 498 U. S. 937 (1990).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *Michigan* v. *Jackson*, 475 U. S. 625 (1986), we held that once this right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective. It is undisputed, and we accept for purposes of the present case, that at the time petitioner provided the incriminating statements at issue, his Sixth Amendment right had attached and had been invoked with respect to the *West Allis armed robbery*, for which he had been formally charged.

The Sixth Amendment right, however, is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984) (quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)). And just as the right is offense specific, so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific.

> "The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged

> with one crime.] . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. . . ." *Maine* v. *Moulton*, 474 U. S. 159, 179–180 (1985).
>
> "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*, at 180, n. 16.

See also *Moran* v. *Burbine*, 475 U. S. 412, 431 (1986). Because petitioner provided the statements at issue here before his Sixth Amendment right to counsel with respect to the *Caledonia offenses* had been (or even could have been) invoked, that right poses no bar to the admission of the statements in this case.

Petitioner relies, however, upon a different "right to counsel," found not in the text of the Sixth Amendment, but in this Court's jurisprudence relating to the Fifth Amendment guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), we established a number of prophylactic rights designed to counteract the "inherently compelling pressures" of custodial interrogation, including the right to have counsel present. *Miranda* did not hold, however, that those rights could not be waived. On the contrary, the opinion recognized that statements elicited during custodial interrogation would be admissible if the prosecution could establish that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the

current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U. S., at 484–485—which means, we have most recently held, that counsel must be present, *Minnick* v. *Mississippi*, 498 U. S. 146 (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990). The *Edwards* rule, moreover, is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present. *Arizona* v. *Roberson*, 486 U. S. 675 (1988).

Having described the nature and effects of both the Sixth Amendment right to counsel and the *Miranda-Edwards* "Fifth Amendment" right to counsel, we come at last to the issue here: Petitioner seeks to prevail by combining the two of them. He contends that, although he expressly waived his *Miranda* right to counsel on every occasion he was interrogated, those waivers were the invalid product of impermissible approaches, because his prior invocation of the offense-specific Sixth Amendment right with regard to the West Allis burglary was also an invocation of the nonoffense-specific *Miranda-Edwards* right. We think that is false as a matter of fact and inadvisable (if even permissible) as a contrary-to-fact presumption of policy.

As to the former: The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to "protec[t] the unaided layman at critical confrontations" with his "expert adversary," the government, *after* "the ad-

verse positions of government and defendant have solidified" with respect to a particular alleged crime. *Gouveia*, 467 U. S., at 189. The purpose of the *Miranda-Edwards* guarantee, on the other hand—and hence the purpose of invoking it—is to protect a quite different interest: the suspect's "desire to deal with the police only through counsel," *Edwards*, *supra*, at 484. This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation) and in another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the "adversarial relationship" produced by a pending prosecution has yet arisen). To invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution. It can be said, perhaps, that it is *likely* that one who has asked for counsel's assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge. That is not necessarily true, since suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions. But even if it were true, the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*. The rule of that case applies only when the suspect "ha[s] *expressed*" his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. *Edwards*, *supra*, at 484 (emphasis added). It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction. "[T]o find that [the defendant] invoked his Fifth Amendment right to counsel on the present charges merely by requesting

the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of that request." *State* v. *Stewart*, 113 Wash. 2d 462, 471, 780 P. 2d 844, 849 (1989), cert. denied, 494 U. S. 1020 (1990).

Our holding in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), does not, as petitioner asserts, contradict the foregoing distinction; to the contrary, it *rests* upon it. That case, it will be recalled, held that after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible. The State in *Jackson* opposed that outcome on the ground that assertion of the Sixth Amendment right to counsel did not realistically constitute the *expression* (as *Edwards* required) of a wish to have counsel present during custodial interrogation. See 475 U. S., at 632–633. Our response to that contention was not that it *did* constitute such an expression, but that it *did not have to*, since the relevant question was not whether the *Miranda* "Fifth Amendment" right had been *asserted*, but whether the Sixth Amendment right to counsel had been *waived*. We said that since our "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we *presume* that the defendant requests the lawyer's services at every critical stage of the prosecution." 475 U. S., at 633 (emphasis added). The holding of *Jackson* implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*. If such invocation constituted a real (as opposed to merely a legally presumed) request for the assistance of counsel in custodial interrogation, it would have been quite unnecessary for *Jackson* to go on to establish, as it did, a new Sixth Amendment rule of no police-

initiated interrogation; we could simply have cited and relied upon *Edwards*.[1]

There remains to be considered the possibility that, even though the assertion of the Sixth Amendment right to counsel does not *in fact* imply an assertion of the *Miranda* "Fifth Amendment" right, we should declare it to be such as a matter of sound policy. Assuming we have such an expansive power under the Constitution, it would not wisely be exercised. Petitioner's proposed rule has only insignificant advantages. If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event *Edwards* would preclude initiation of the interview). The proposed rule would, however, seriously impede effective law enforcement. The Sixth Amendment right to

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[1] A footnote in *Jackson*, 475 U. S., at 633–634, n. 7, quoted with approval statements by the Michigan Supreme Court to the effect that the average person does not "'understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel,'" that it "'makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge,'" and that "'[t]he simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.'" *Michigan* v. *Bladel*, 421 Mich. 39, 63–64, 365 N. W. 2d 56, 67 (1984). Those observations were perhaps true in the context of deciding whether a request for the assistance of counsel in defending against a particular charge implied a desire to have that counsel serve as an "intermediary" for all further interrogation on that charge. They are assuredly not true in the quite different context of deciding whether such a request implies a desire never to undergo custodial interrogation, about anything, without counsel present.

counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at that time and ordinarily requested. Thus, if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.* Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U. S., at 426 (citation omitted).[2]

Petitioner urges upon us the desirability of providing a "clear and unequivocal" guideline for the police: no police-initiated questioning of any person in custody who has requested counsel to assist him in defense or in interrogation. But the police do not need our assistance to establish such a

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[2] The dissent condemns these sentiments as "revealing a preference for an inquisitorial system of justice." *Post*, at 189. We cannot imagine what this means. What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. In the inquisitorial criminal process of the civil law, the defendant ordinarily has counsel; and in the adversarial criminal process of the common law, he sometimes does not. Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable. Even if detectives were to bring impartial magistrates around with them to all interrogations, there would be no decision for the impartial magistrate to umpire. If all the dissent means by a "preference for an inquisitorial system" is a preference not to require the presence of counsel during an investigatory interview where the interviewee has not requested it—that is a strange way to put it, but we are guilty.

guideline; they are free, if they wish, to adopt it on their own. Of course it *is* our task to establish guidelines for judicial review. We like *them* to be "clear and unequivocal," see, *e. g.*, *Roberson*, 486 U. S., at 681–682, but only when they guide sensibly and in a direction we are authorized to go. Petitioner's proposal would in our view do much more harm than good, and is not contained within, or even in furtherance of, the Sixth Amendment's right to counsel or the Fifth Amendment's right against compelled self-incrimination.[3]

* * *

"This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (opinion of Jackson, J.). We decline to add yet another story to *Miranda*. The judgment of the Wisconsin Supreme Court is

Affirmed.

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[3] The dissent predicts that the result in this case will routinely be circumvented when, "[i]n future preliminary hearings, competent counsel . . . make sure that they, or their clients, make a statement on the record" invoking the *Miranda* right to counsel. *Post*, at 184. We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve, cf. *Pennsylvania* v. *Muniz*, 496 U. S. 582, 601–602 (1990) (plurality opinion); *Rhode Island* v. *Innis*, 446 U. S. 291, 298–303 (1980). If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed *no* objection to being questioned would be unapproachable.

JUSTICE KENNEDY, concurring.

I join the opinion of the Court in all respects. Its sensible recognition that invocation of the Sixth Amendment right to counsel is specific to the offense in question should apply as well to requests for counsel under the Fifth Amendment. See *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting). For those in custody, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), and its progeny go far to protect an individual who desires the assistance of counsel during interrogation. Limiting the extraordinary protections of *Edwards* to a particular investigation would not increase the risk of confessions induced by official efforts to wear down the will of a suspect. Having adopted an offense-specific rule for invocation of the Sixth Amendment right to counsel, the Court should devote some attention to bringing its Fifth and Sixth Amendment jurisprudence into a logical alignment, and should give uniform, fair, and workable guidelines for the criminal justice system.

Even if petitioner had invoked his Fifth Amendment right with respect to the West Allis armed robbery, I do not believe the authorities should have been prohibited from questioning him in connection with the Caledonia offenses.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Court's opinion demeans the importance of the right to counsel. As a practical matter, the opinion probably will have only a slight impact on current custodial interrogation procedures. As a theoretical matter, the Court's innovative development of an "offense-specific" limitation on the scope of the attorney-client relationship can only generate confusion in the law and undermine the protections that undergird our adversarial system of justice. As a symbolic matter, today's decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.

I

The predicate for the Court's entire analysis is the failure of the defendant at the preliminary hearing to make a "statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *Ante*, at 178. If petitioner in this case had made such a statement indicating that he was invoking his Fifth Amendment right to counsel as well as his Sixth Amendment right to counsel, the entire offense-specific house of cards that the Court has erected today would collapse, pursuant to our holding in *Arizona* v. *Roberson*, 486 U. S. 675 (1988), that a defendant who invokes the right to counsel for interrogation on one offense may not be reapproached regarding any offense unless counsel is present.

In future preliminary hearings, competent counsel can be expected to make sure that they, or their clients, make a statement on the record that will obviate the consequences of today's holding. That is why I think this decision will have little, if any, practical effect on police practices.

II

The outcome of this case is determined by the Court's parsimonious "offense-specific" description of the right to counsel guaranteed by the Sixth Amendment. The Court's definition is inconsistent with the high value our prior cases have placed on this right, with the ordinary understanding of the scope of the right, and with the accepted practice of the legal profession.

In *Michigan* v. *Jackson*, 475 U. S. 625 (1986), we held that the defendant's invocation of his right to the assistance of counsel at arraignment prohibited the police from initiating a postarraignment custodial interrogation without notice to his lawyer. After explaining that our prior cases required us "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel," we squarely rejected "the

State's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings." *Id.*, at 633. Instead, we noted that "it is the State that has the burden of establishing a valid waiver [of the right to counsel]. Doubts must be resolved in favor of protecting the constitutional claim." *Ibid.* (citation omitted).

Today, however, the Court accepts a narrow, rather than a broad, interpretation of the same right. It accepts the State's suggestion that although, under our prior holding in *Michigan* v. *Jackson*, a request for the assistance of counsel at a formal proceeding such as an arraignment constitutes an invocation of the right to counsel at police-initiated custodial interrogation as well, such a request only covers interrogation about the specific charge that has already been filed and for which the formal proceeding was held. Today's approach of construing ambiguous requests for counsel narrowly and presuming a waiver of rights is the opposite of that taken in *Jackson*.

The Court's holding today moreover rejects the commonsense evaluation of the nature of an accused's request for counsel that we expressly endorsed in *Jackson:*

> "We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:
>
> "'Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes

> an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.' 421 Mich., at 63–64, 365 N. W. 2d, at 67." *Id.*, at 633–634, n. 7.

The Court explains away this commonsense understanding by stating that although "[t]hose observations were perhaps true in the context of deciding whether a request for the assistance of counsel in defending against a particular charge implied a desire to have that counsel serve as an 'intermediary' for all further interrogation on that charge[, t]hey are assuredly not true in the quite different context of deciding whether such a request implies a desire never to undergo custodial interrogation, about anything, without counsel present." *Ante*, at 180, n. 1. Even assuming that this explanation by the Court could be supported if the custodial interrogation related to an offense that was entirely separate from the charge for which a suspect had invoked his Sixth Amendment right to counsel, it cannot explain away the commonsense reality that petitioner in this case could not have known that his invocation of his Sixth Amendment right to counsel was restricted to the Milwaukee County offense, given that investigations of the Milwaukee County offense and the Caledonia offense were concurrent and conducted by overlapping personnel.[1]

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[1] After McNeil was first apprehended in Omaha pursuant to the Milwaukee County arrest warrant, Deputy Sheriff Smukowski of Milwaukee County and a colleague from the same department traveled to Omaha for purposes of transporting McNeil back to Wisconsin. Smukowski testified at trial that prior to going to Omaha he had been aware that McNeil was a suspect in the Caledonia murder as well as in the Milwaukee County armed robbery. Tr. 4–5 (Nov. 9, 1987). He further testified that on May 21, 1987, he and his colleague talked to McNeil during the transport back to Wisconsin "about the murder case and the armed robbery," *id.*, at 7, and that they were operating under the understanding that they would take "a statement as to either case" if McNeil would provide one, *id.*, at 9. Smukowski testified that they urged petitioner to "tell his side of the

Finally, the Court's "offense-specific" characterization of the constitutional right to counsel ignores the substance of the attorney-client relationship that the legal profession has developed over the years. The scope of the relationship between an individual accused of crime and his attorney is as broad as the subject matter that might reasonably be encompassed by negotiations for a plea bargain or the contents of a presentence investigation report. Any notion that a constitutional right to counsel is, or should be, narrowly defined by the elements of a pending charge is both unrealistic and invidious. Particularly given the implication that McNeil would be given favorable treatment if he told "his side of the story" as to either or both crimes to the Milwaukee County officers, I find the Court's restricted construal of McNeil's relationship with his appointed attorney at the arraignment on the armed robbery charges to be unsupported.

In any case, the offense-specific limitation on the Sixth Amendment right to counsel can only generate confusion in the law. The parties and the Court have assumed in this case, for the purposes of analyzing the legal issues, that the custodial interrogation of McNeil involved an offense (murder) that was completely unrelated to the pending charge of armed robbery. The Court therefore does not flesh out the precise boundaries of its newly created "offense-specific" limitation on a venerable constitutional right. I trust its boundaries will not be patterned after the Court's double jeopardy jurisprudence, cf. *Blockburger* v. *United States*, 284 U. S. 299 (1932), and I can only wonder how much leeway it will accord the police to file charges selectively in order to preserve opportunities for custodial interrogation, particularly if the Court is so unquestioningly willing to treat the offenses in this case as separate even though the investigations were

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story" in order that his cooperation might help him later, *id.*, at 8, and that prior to leaving Omaha with petitioner, Smukowski and his colleague used petitioner's help in trying to locate Crowley, another suspect in the Caledonia murder, in Omaha, *id.*, at 13.

concurrent and conducted by overlapping personnel. Whatever the future may portend, the Court's new rule can only dim the "bright-line" quality of prior cases such as *Edwards* v. *Arizona*, 451 U. S. 477 (1981), *Solem* v. *Stumes*, 465 U. S. 638 (1984), and *Michigan* v. *Jackson*, 475 U. S. 625 (1986).

III

In the final analysis, the Court's decision is explained by its fear that making counsel available to persons held in custody would "seriously impede effective law enforcement." *Ante*, at 180. The magnitude of the Court's alarm is illuminated by its use of italics:

> "Thus, if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.*" *Ante*, at 181.

Of course, the Court is quite wrong and its fears are grossly exaggerated. The fears are exaggerated because, as I have explained, today's holding will probably affect very few cases in the future. The fears are misguided because a contrary rule would not make all pretrial detainees "unapproachable"; it would merely serve to ensure that a suspect's statements during custodial interrogation are truly voluntary.

A contrary rule would also comport with respect to tradition. Undergirding our entire line of cases requiring the police to follow fair procedures when they interrogate presumptively innocent citizens suspected of criminal wrongdoing is the longstanding recognition that an adversarial system of justice can function effectively only when the adversaries communicate with one another through counsel and when laypersons are protected from overreaching by more experienced and skilled professionals. Whenever the Court ignores the importance of fair procedure in this context and describes the societal interest in obtaining "uncoerced confes-

sions" from pretrial detainees as an "unmitigated good," the Court is revealing a preference for an inquisitorial system of justice. As I suggested in *Moran* v. *Burbine*, 475 U. S. 412 (1986):

> "This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all." *Id.*, at 468 (STEVENS, J., dissenting).

The Court's refusal to acknowledge any "danger of 'subtle compulsion'"[2] in a case of this kind evidences an inability to recognize the difference between an inquisitorial and an adversarial system of justice. Accordingly, I respectfully dissent.

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[2] In his opinion dissenting for himself and two other members of the Wisconsin Supreme Court, Chief Justice Heffernan wrote:

"It is apparent that there is danger of 'subtle compulsion' when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* [v. *Arizona*, 451 U. S. 477 (1981),] protection is not dependent upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated." 155 Wis. 2d 24, 50, 454 N. W. 2d 742, 752–753 (1990).

See also *United States ex rel. Espinoza* v. *Fairman*, 813 F. 2d 117 (CA7 1987).

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–285. Argued March 20, 1991—Decided June 13, 1991

Among other things, the collective-bargaining agreement (Agreement) between petitioner Litton and the Union representing the production employees at Litton's printing plant broadly required that all differences as to contract construction or violations be determined by arbitration, specified that grievances that could not be resolved under a two-step grievance procedure should be submitted for binding arbitration, and provided that, in case of layoffs, length of continuous service would be the determining factor "if other things such as aptitude and ability [were] equal." The Agreement expired in October 1979. A new agreement had not been negotiated when, in August and September 1980 and without any notice to the Union, Litton laid off 10 of the workers at its plant, including 6 of the most senior employees, pursuant to its decision to close down its coldtype printing operation. The Union filed grievances on behalf of the laid off employees, claiming a violation of the Agreement, but Litton refused to submit to the contractual grievance and arbitration procedure, to negotiate over its layoff decision, or to arbitrate under any circumstances. Based on its precedents dealing with unilateral postexpiration abandonment of contractual grievance procedures and postexpiration arbitrability, the National Labor Relations Board (Board) held that Litton's actions violated §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA). However, although it ordered Litton, *inter alia*, to process the grievances through the two-step grievance procedure and to bargain with the Union over the layoffs, the Board refused to order arbitration of the particular layoff disputes, ruling that they did not "arise under" the expired contract as required by its decision in *Indiana & Michigan Electric Co.*, 284 N. L. R. B. 53, and its interpretation of this Court's decision in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243. The Court of Appeals enforced the Board's order, with the exception of that portion holding the layoff grievance not arbitrable, ruling that the right to lay off in seniority order, if other things such as aptitude and ability were equal, did arise under the Agreement.

Held: The layoff dispute was not arbitrable. Pp. 198–210.

(a) The unilateral change doctrine of *NLRB* v. *Katz*, 369 U. S. 736—whereby an employer violates the NLRA if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment—extends to cases in which an existing agreement has expired and negotiations on a new one have yet to be completed. See, *e. g.*, *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U. S. 539, 544, n. 6. However, since *Hilton-Davis Chemical Co.*, 185 N. L. R. B. 241, the Board has held that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz*, continue in effect after expiration of a collective-bargaining agreement. Pp. 198–200.

(b) This Court will not extend the unilateral change doctrine to impose a statutory duty to arbitrate postexpiration disputes. The Board's *Hilton-Davis Chemical Co.* rule is both rational and consistent with the NLRA, under which arbitration is a matter of consent and will not be imposed beyond the scope of the parties' agreement. See, *e. g.*, *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 374. The Board's rule is therefore entitled to deference. If parties who favor labor arbitration during a contract's term also desire it to resolve postexpiration disputes, they can draft their agreement to so indicate, to eliminate any hiatus between expiration of the old and execution of the new agreement, or to remain in effect until they bargain to impasse. Pp. 200–201.

(c) The Board's decision not to order arbitration of the layoff grievances in this case is not entitled to substantial deference. Although the Board has considerable authority to structure its remedial orders to effectuate the NLRA's purposes and to order the relief it deems appropriate, its decision here is not based on statutory considerations, but rests upon its interpretation of the Agreement, applying *Nolde Brothers*, and the federal common law of collective bargaining. Arbitrators and courts, rather than the Board, are the principal sources of contract interpretation under § 301 of the Labor Management Relations Act, 1947. Deferring to the Board in its interpretation of contracts would risk the development of conflicting principles. Pp. 201–203.

(d) Nevertheless, as *Nolde Brothers* recognized, a postexpiration duty to arbitrate a dispute may arise from the express or implied terms of the expired agreement itself. Holding that the extensive obligation to arbitrate under the contract there at issue was not consistent with an interpretation that would eliminate all duty to arbitrate upon expiration, *Nolde Brothers*, *supra*, at 255, found a presumption in favor of postexpiration arbitration of disputes unless negated expressly or by clear implication, so long as such disputes arose out of the relation governed by contract. Pp. 203–204.

(e) The Agreement's unlimited arbitration clause places it within the precise rationale of *Nolde Brothers*, such that other Agreement provisions cannot rebut the *Nolde Brothers* presumption. P. 205.

(f) However, *Nolde Brothers* does not announce a broad rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable, but applies only where a dispute has its real source in the contract. Absent an explicit agreement that certain benefits continue past expiration, a postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arise before expiration, where a postexpiration action infringes a right that accrued or vested under the agreement, or where, under the normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement. And, as *Nolde Brothers* found, structural provisions relating to remedies and dispute resolution—*e. g.*, an arbitration provision—may in some cases survive in order to enforce duties under the contract. It is presumed as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the Agreement's expiration. Pp. 205–208.

(g) Application of the foregoing principles reveals that the layoff dispute at issue does not arise under the Agreement. Since the layoffs took place almost one year after the Agreement expired, the grievances are arbitrable only if they involve rights which accrued or vested under the Agreement or carried over after its expiration. The layoff provision here does not satisfy these requirements and, unlike the severance pay provision at issue in *Nolde Brothers*, cannot be construed as a grant of deferred compensation for time already worked. The order of layoffs under the Agreement was to be determined primarily with reference to "other [factors] such as aptitude and ability," which do not remain constant, but either improve or atrophy over time, and which vary in importance with the requirements of the employer's business at any given moment. Thus, any arbitration proceeding would of necessity focus upon whether such factors were equal as of the date of the layoff decision and the decision to close down the coldtype operation, and an intent to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration cannot be inferred. Pp. 208–210.

893 F. 2d 1128, reversed in part.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and SCALIA, JJ., joined, *post*, p. 211. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and SCALIA, JJ., joined, *post*, p. 218.

M. J. Diederich argued the cause and filed briefs for petitioner.

Deputy Solicitor General Wallace argued the cause for the federal respondent in support of petitioner pursuant to this Court's Rule 12.4. With him on the briefs were *Solicitor General Starr*, *Michael R. Lazerwitz*, *Norton J. Come*, *Linda Sher*, and *David A. Fleischer*. *David A. Rosenfeld* argued the cause for the private respondent. With him on the brief were *Victor J. Van Bourg*, *Marsha S. Berzon*, *Steven J. Kaplan*, and *Laurence Gold*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to determine whether a dispute over layoffs which occurred well after expiration of a collective-bargaining agreement must be said to arise under the agreement despite its expiration. The question arises in the context of charges brought by the National Labor Relations Board (Board), alleging an unfair labor practice in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U. S. C. §§ 158(a)(1) and (5). We interpret our earlier decision in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243 (1977).

I

Petitioner Litton operated a check printing plant in Santa Clara, California. The plant utilized both coldtype and hot-type printing processes. Printing Specialties & Paper Products Union No. 777, Affiliated With District Council No. 1 (Union), represented the production employees at the plant. The Union and Litton entered into a collective-bargaining agreement (Agreement) which, with extensions, remained in effect until October 3, 1979. Section 19 of the Agreement is a broad arbitration provision:

**John S. Irving* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

> "Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth." App. 34.

Section 21 of the Agreement sets forth a two-step grievance procedure, at the conclusion of which, if a grievance cannot be resolved, the matter may be submitted for binding arbitration. *Id.*, at 35.

Soon before the Agreement was to expire, an employee sought decertification of the Union. The Board conducted an election on August 17, 1979, in which the Union prevailed by a vote of 28 to 27. On July 2, 1980, after much postelection legal maneuvering, the Board issued a decision to certify the Union. No contract negotiations occurred during this period of uncertainty over the Union's status.

Litton decided to test the Board's certification decision by refusing to bargain with the Union. The Board rejected Litton's position and found its refusal to bargain an unfair labor practice. *Litton Financial Printing Division*, 256 N. L. R. B. 516 (1981). Meanwhile, Litton had decided to eliminate its coldtype operation at the plant, and in late August and early September 1980, laid off 10 of the 42 persons working in the plant at that time. The laid off employees worked either primarily or exclusively with the coldtype operation, and included 6 of the 11 most senior employees in the plant. The layoffs occurred without any notice to the Union.

The Union filed identical grievances on behalf of each laid off employee, claiming a violation of the Agreement, which had provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." App. 30. Litton refused to submit to the grievance and arbitration procedure or to negotiate over the decision to lay off the employees, and took a position later interpreted by the Board as a refusal to arbi-

trate under any and all circumstances. It offered instead to negotiate concerning the effects of the layoffs.

On November 24, 1980, the General Counsel for the Board issued a complaint alleging that Litton's refusal to process the grievances amounted to an unfair labor practice within the meaning of §§ 8(a)(1) and (5) of the NLRA, 29 U. S. C. §§ 158(a)(1) and (5). App. 15. On September 4, 1981, an Administrative Law Judge found that Litton had violated the NLRA by failing to process the grievances. *Id.*, at 114–115. Relying upon the Board's decision in *American Sink Top & Cabinet Co.*, 242 N. L. R. B. 408 (1979), the Administrative Law Judge went on to state that if the grievances remained unresolved at the conclusion of the grievance process, Litton could not refuse to submit them to arbitration. App. 115–118. The Administrative Law Judge held also that Litton violated §§ 8(a)(1) and (5) when it bypassed the Union and paid severance wages directly to the 10 laid off employees, and Litton did not contest that determination in further proceedings.

Over six years later, the Board affirmed in part and reversed in part the decision of the Administrative Law Judge. 286 N. L. R. B. 817 (1987). The Board found that Litton had a duty to bargain over the layoffs and violated § 8(a) by failing to do so. Based upon well-recognized Board precedent that the unilateral abandonment of a contractual grievance procedure upon expiration of the contract violates §§ 8(a)(1) and (5), the Board held that Litton had improperly refused to process the layoff grievances. See *Bethlehem Steel Co.*, 136 N. L. R. B. 1500, 1503 (1962), enforced in pertinent part, 320 F. 2d 615 (CA3 1963). The Board proceeded to apply its recent decision in *Indiana & Michigan Electric Co.*, 284 N. L. R. B. 53 (1987), which contains the Board's current understanding of the principles of postexpiration arbitrability and of our opinion in *Nolde Brothers, Inc.* v. *Bakery Workers*, *supra*. The Board held that Litton's "wholesale repudiation" of its obligation to arbitrate any contractual grievance

after the expiration of the Agreement also violated §§ 8(a)(1) and (5), as the Agreement's broad arbitration clause lacked

> "language sufficient to overcome the presumption that the obligation to arbitrate imposed by the contract extended to disputes arising under the contract and occurring after the contract had expired. Thus, [Litton] remained 'subject to a potentially viable contractual commitment to arbitrate even after the [Agreement] expired.'" 286 N. L. R. B., at 818 (citation omitted).

Litton did not seek review of, and we do not address here, the Board's determination that Litton committed an unfair labor practice by its unilateral abandonment of the grievance process and wholesale repudiation of any postexpiration obligation to arbitrate disputes.

In fashioning a remedy, the Board went on to consider the arbitrability of these particular layoff grievances. Following *Indiana & Michigan*, the Board declared its determination to order arbitration "only when the grievances at issue 'arise under' the expired contract." 286 N. L. R. B., at 821 (citing *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243 (1977)). In finding that the dispute about layoffs was outside this category, the Board reasoned as follows:

> "The conduct that triggered the grievances . . . occurred after the contract had expired. The right to layoff by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.' *Indiana & Michigan*, supra at 61. And, as in *Indiana & Michigan Electric*, there is no indication here that 'the parties contemplated that such rights could ripen or remain enforceable even after the contract expired.' *Id.* (citation omitted). Therefore, [Litton] had no contractual obligation to arbitrate the grievances." 286 N. L. R. B., at 821–822.

Although the Board refused to order arbitration, it did order Litton to process the grievances through the two-step griev-

ance procedure, to bargain with the Union over the layoffs, and to provide a limited backpay remedy.

The Board sought enforcement of its order, and both the Union and Litton petitioned for review. The Court of Appeals enforced the Board's order, with the exception of that portion holding the layoff grievances not arbitrable. 893 F. 2d 1128 (CA9 1990). On that question, the Court of Appeals was willing to "assume without deciding that the Board's *Indiana & Michigan* decision is a reasonably defensible construction of the section 8(a)(5) duty to bargain." *Id.*, at 1137. The court decided, nevertheless, that the Board had erred, because the right in question, the right to layoff in order of seniority if other things such as aptitude and ability are equal, did arise under the Agreement. The Court of Appeals thought the Board's contrary conclusion was in conflict with two later Board decisions, where the Board had recognized that seniority rights may arise under an expired contract, *United Chrome Products, Inc.*, 288 N. L. R. B. 1176 (1988), and *Uppco, Inc.*, 288 N. L. R. B. 937 (1988).

The court cited a second conflict, one between *Indiana & Michigan* and the court's own interpretation of *Nolde Bros.* in *Local Joint Executive Bd. of Las Vegas Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F. 2d 1159 (CA9 1986). In *Royal Center*, the Court of Appeals had rejected the argument that only rights accruing or vesting under a contract prior to termination are covered by the posttermination duty to arbitrate. *Id.*, at 1163.

Litton petitioned for a writ of certiorari. Because of substantial disagreement as to the proper application of our decision in *Nolde Brothers*,[1] we granted review limited to the

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[1] The conflict between the Ninth Circuit's reasoning in *Local Joint Executive Bd. of Las Vegas Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F. 2d 1159 (1986), and the Board's approach in *Indiana & Michigan Electric Co.*, 284 N. L. R. B. 53 (1987), reflects a wider split of authority. The Third and Fifth Circuits follow an approach similar to that of the Ninth Circuit. See *Federated Metals Corp.* v. *United Steelworkers*

question of arbitrability of the layoff grievances. 498 U. S. 966 (1990).

II

A

Sections 8(a)(5) and 8(d) of the NLRA, 29 U. S. C. §§ 158(a)(5) and (d), require an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See *NLRB* v. *Katz*, 369 U. S. 736 (1962). In *Katz* the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. See, *e. g.*, *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U. S. 539, 544, n. 6 (1988).

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of America, 648 F. 2d 856, 861 (CA3), cert. denied, 454 U. S. 1031 (1981); *Seafarers Int'l Union of North America* v. *National Marine Servs., Inc.*, 820 F. 2d 148, 152–154 (CA5), cert. denied, 484 U. S. 953 (1987). The Eighth Circuit, Tenth Circuit, and the Michigan Supreme Court follow the Board's approach and limit the presumption of postexpiration arbitrability to rights that accrued or vested under the agreement, or events that took place prior to expiration of the agreement. See *Chauffeurs, Teamsters and Helpers, Local Union 238* v. *C. R. S. T. Inc.*, 795 F. 2d 1400, 1404 (CA8 1986) (en banc); *United Food & Commercial Workers Int'l Union, AFL–CIO, Local 7* v. *Gold Star Sausage Co.*, 897 F. 2d 1022, 1025–1026 (CA10 1990); *County of Ottawa* v. *Jaklinski*, 423 Mich. 1, 377 N. W. 2d 668 (1985) (discussing *Nolde* in context of Michigan law applicable to public employers). The Seventh Circuit, finally, restricts application of *Nolde Brothers* to a limited period following expiration of a bargaining agreement. See *Local 703, Int'l Brotherhood of Teamsters* v. *Kennicott Bros. Co.*, 771 F. 2d 300 (1985).

Numerous terms and conditions of employment have been held to be the subject of mandatory bargaining under the NLRA. See generally 1 C. Morris, The Developing Labor Law 772–844 (2d ed. 1983). Litton does not question that arrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining. See *id.*, at 813 (citing cases); *United States Gypsum Co.*, 94 N. L. R. B. 112, 131 (1951).

The Board has ruled that most mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes. The Board has identified some terms and conditions of employment, however, which do not survive expiration of an agreement for purposes of this statutory policy. For instance, it is the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only when specified by the express terms of a collective-bargaining agreement. See 29 U. S. C. § 158(a)(3) (union security conditioned upon agreement of the parties); § 186(c)(4) (dues check-off valid only until termination date of agreement); *Indiana & Michigan*, 284 N. L. R. B., at 55 (quoting *Bethlehem Steel*, 136 N. L. R. B., at 1502). Also, in recognition of the statutory right to strike, no-strike clauses are excluded from the unilateral change doctrine, except to the extent other dispute resolution methods survive expiration of the agreement. See 29 U. S. C. §§ 158(d)(4), 163 (union's statutory right to strike); *Southwestern Steel & Supply, Inc.* v. *NLRB*, 257 U. S. App. D. C. 19, 23, 806 F. 2d 1111, 1114 (1986).

In *Hilton-Davis Chemical Co.*, 185 N. L. R. B. 241 (1970), the Board determined that arbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a "voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties. . . . [A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are other-

wise free to utilize." *Id.*, at 242. The Board further relied upon our statements acknowledging the basic federal labor policy that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960). See also 29 U. S. C. § 173(d) (phrased in terms of parties' agreed-upon method of dispute resolution under an *existing* bargaining agreement). Since *Hilton-Davis*, the Board has adhered to the view that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz*, continue in effect after expiration of a collective-bargaining agreement.

B

The Union argues that we should reject the Board's decision in *Hilton-Davis Chemical Co.*, and instead hold that arbitration provisions are within *Katz*' prohibition on unilateral changes. The unilateral change doctrine, and the exclusion of arbitration from the scope of that doctrine, represent the Board's interpretation of the NLRA requirement that parties bargain in good faith. And "[i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 42 (1987); see, *e. g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 786–787 (1990).

We think the Board's decision in *Hilton-Davis Chemical Co.* is both rational and consistent with the Act. The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration. See *Indiana & Michigan*, *supra*, at 57–58; *Hilton-Davis Chemical Co.*, *supra*. The rule conforms with our statement that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway*

Coal Co. v. *Mine Workers*, 414 U. S. 368, 374 (1974). We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.

In the absence of a binding method for resolution of post-expiration disputes, a party may be relegated to filing unfair labor practice charges with the Board if it believes that its counterpart has implemented a unilateral change in violation of the NLRA. If, as the Union urges, parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement. Further, a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement, or to remain in effect until the parties bargain to impasse.[2] Unlike the Union's suggestion that we impose arbitration of postexpiration disputes upon parties once they agree to arbitrate disputes arising under a contract, these alternatives would reinforce the statutory policy that arbitration is not compulsory.

III

The Board argues that it is entitled to substantial deference here because it has determined the remedy for an unfair labor practice. As noted above, we will uphold the Board's interpretation of the NLRA so long as it is "rational and consistent with the Act." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, *supra*, at 42. And we give the greatest latitude to the Board when its decision reflects its "'difficult

[2] See, *e. g.*, *NLRB* v. *New England Newspapers, Inc.*, 856 F. 2d 409, 410 (CA1 1988) (agreement would continue in effect until a new agreement was reached); *Montgomery Mailers' Union No. 127* v. *The Advertiser Co.*, 827 F. 2d 709, 712, n. 5 (CA11 1987) (agreement to continue in effect "for a reasonable time for negotiation of a new agreement"); *Teamsters Local Union 688* v. *John J. Meier Co.*, 718 F. 2d 286, 287 (CA8 1983) ("[A]ll terms and provisions of the expired agreement shall continue in effect until a new agreement is adopted or negotiations are terminated").

and delicate responsibility' of reconciling conflicting interests of labor and management," *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 267 (1975). We have accorded the Board considerable authority to structure its remedial orders to effect the purposes of the NLRA and to order the relief it deems appropriate. See *Shepard* v. *NLRB*, 459 U. S. 344, 352 (1983); *Virginia Electric & Power Co.* v. *NLRB*, 319 U. S. 533, 540 (1943).

The portion of the Board's decision which we review today does discuss the appropriate remedy for a violation of the NLRA. But it does not follow that we must accord the same deference we recognized in *Virginia Electric & Power Co.* and *Shepard*. Here, the Board's remedial discussion is not grounded in terms of any need to arbitrate these grievances in order "to effectuate the policies of the Act." *Virginia Electric & Power Co., supra*, at 540. Rather, the Board's decision not to order arbitration of the layoff grievances rests upon its interpretation of the Agreement, applying our decision in *Nolde Brothers* and the federal common law of collective-bargaining agreements. The Board now defends its decision on the ground that it need not "reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice," *Shepard* v. *NLRB*, *supra*, at 352; but its decision did not purport to rest upon such grounds.

Although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, see *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967), the Board is neither the sole nor the primary source of authority in such matters. "Arbitrators and courts are still the principal sources of contract interpretation." *NLRB* v. *Strong*, 393 U. S. 357, 360–361 (1969). Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185, "authorizes *federal courts* to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Textile Workers* v. *Lincoln Mills*

of Alabama, 353 U. S. 448, 451 (1957) (emphasis added). We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract. We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301. See *Local Union 1395, Int'l Brotherhood of Electrical Workers* v. *NLRB*, 254 U. S. App. D. C. 360, 363–364, 797 F. 2d 1027, 1030–1031 (1986).

IV

The duty not to effect unilateral changes in most terms and conditions of employment, derived from the statutory command to bargain in good faith, is not the sole source of possible constraints upon the employer after the expiration date of a collective-bargaining agreement. A similar duty may arise as well from the express or implied terms of the expired agreement itself. This, not the provisions of the NLRA, was the source of the obligation which controlled our decision in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243 (1977). We now discuss that precedent in the context of the case before us.

In *Nolde Brothers*, a union brought suit under § 301 of the LMRA, 29 U. S. C. § 185, to compel arbitration. Four days after termination of a collective-bargaining agreement, the employer decided to cease operations. The employer settled employee wage claims, but refused to pay severance wages called for in the agreement, and declined to arbitrate the resulting dispute. The union argued that these wages

> "were in the nature of 'accrued' or 'vested' rights, earned by employees during the term of the contract on essentially the same basis as vacation pay, but payable only upon termination of employment." *Nolde Brothers*, 430 U. S., at 248.

We agreed that

> "whatever the outcome, the resolution of that claim hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute therefore, although arising *after* the expiration of the collective-bargaining contract, clearly arises *under* that contract." *Id.*, at 249 (emphasis in original).

We acknowledged that "the arbitration duty is a creature of the collective-bargaining agreement" and that the matter of arbitrability must be determined by reference to the agreement, rather than by compulsion of law. *Id.*, at 250–251. With this understanding, we held that the extensive obligation to arbitrate under the contract in question was not consistent with an interpretation that would eliminate all duty to arbitrate as of the date of expiration. That argument, we noted,

> "would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term." *Id.*, at 251.

We found "strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract," *id.*, at 253, and noted that "the parties' failure to exclude from arbitrability contract disputes arising after termination . . . affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship," *id.*, at 255. We found a presumption in favor of postexpiration arbitration of matters unless "negated expressly or by clear implication," *ibid.*, but that conclusion was limited by the vital qualification that arbitration was of matters and disputes arising out of the relation governed by contract.

A

Litton argues that provisions contained in the Agreement rebut the *Nolde Brothers* presumption that the duty to arbitrate disputes arising under an agreement outlasts the date of expiration. The Agreement provides that its stipulations "shall be in effect for the time hereinafter specified," App. 22, in other words, until the date of expiration and no longer. The Agreement's no-strike clause, which Litton characterizes as a *quid pro quo* for arbitration, applies only "during the term of this [a]greement," *id.*, at 34. Finally, the Agreement provides for "interest arbitration" in case the parties are unable to conclude a successor agreement, *id.*, at 53–55, proving that where the parties wished for arbitration other than to resolve disputes as to contract interpretation, they knew how to draft such a clause. These arguments cannot prevail. The Agreement's unlimited arbitration clause, by which the parties agreed to arbitrate all "[d]ifferences that may arise between the parties" regarding the Agreement, violations thereof, or "the construction to be placed on any clause or clauses of the Agreement," *id.*, at 34, places it within the precise rationale of *Nolde Brothers*. It follows that if a dispute arises under the contract here in question, it is subject to arbitration even in the postcontract period.

B

With these matters resolved, we come to the crux of our inquiry. We agree with the approach of the Board and those courts which have interpreted *Nolde Brothers* to apply only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it. *Nolde Brothers* does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of *Nolde Brothers*. The *Nolde Brothers* presumption is limited to disputes arising under the contract. A postexpiration grievance can be

said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Any other reading of *Nolde Brothers* seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract. See *Office and Professional Employees Ins. Trust Fund* v. *Laborers Funds Administrative Office of Northern California, Inc.*, 783 F. 2d 919, 922 (CA9 1986) ("An expired [collective-bargaining agreement] . . . is no longer a 'legally enforceable document'" (citation omitted)); cf. *Derrico* v. *Sheehan Emergency Hosp.*, 844 F. 2d 22, 25–27 (CA2 1988) (Section 301 of the LMRA, 29 U. S. C. § 185, does not provide for federal court jurisdiction where a bargaining agreement has expired, although rights and duties under the expired agreement "retain legal significance because they define the *status quo*" for purposes of the prohibition on unilateral changes).

The difference is as elemental as that between *Nolde Brothers* and *Katz*. Under *Katz*, terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them. As the Union acknowledges, the obligation not to make uni-

lateral changes is "rooted not in the contract but in preservation of existing terms and conditions of employment and applies before any contract has been negotiated." Brief for Respondent Union 34, n. 21. *Katz* illustrates this point with utter clarity, for in *Katz* the employer was barred from imposing unilateral changes even though the parties had yet to execute their first collective-bargaining agreement.

Our decision in *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U. S. 539 (1988), further demonstrates the distinction between contractual obligations and postexpiration terms imposed by the NLRA. There, a bargaining agreement required employer contributions to a pension fund. We assumed that under *Katz* the employer's failure to continue contributions after expiration of the agreement could constitute an unfair labor practice, and if so the Board could enforce the obligation. We rejected, however, the contention that such a failure amounted to a violation of the ERISA obligation to make contributions "under the terms of a collectively bargained agreement . . . in accordance with the terms and conditions of . . . such agreement." 29 U. S. C. § 1145. Any postexpiration obligation to contribute was imposed by the NLRA, not by the bargaining agreement, and so the District Court lacked jurisdiction under § 502(g)(2) of ERISA, 29 U. S. C. § 1132(g)(2), to enforce the obligation.

As with the obligation to make pension contributions in *Advanced Lightweight Concrete Co.*, other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitra-

tion provisions. See *United Steelworkers of America* v. *Fort Pitt Steel Casting, Division of Conval-Penn, Inc.*, 598 F. 2d 1273 (CA3 1979) (agreement provided for continuing medical benefits in the event of postexpiration labor dispute).

Finally, as we found in *Nolde Brothers*, structural provisions relating to remedies and dispute resolution—for example, an arbitration provision—may in some cases survive in order to enforce duties arising under the contract. *Nolde Brothers*' statement to that effect under § 301 of the LMRA is similar to the rule of contract interpretation which might apply to arbitration provisions of other commercial contracts.[3] We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.

C

The Union, and JUSTICE STEVENS' dissent, argue that we err in reaching the merits of the issue whether the post-termination grievances arise under the expired agreement because, it is said, that is an issue of contract interpretation to be submitted to an arbitrator in the first instance. Whether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to "arbitrate the arbitrability question." *AT&T Technologies, Inc.* v.

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[3] See, *e. g.*, *West Virginia ex rel. Ranger Fuel Corp.* v. *Lilly*, 165 W. Va. 98, 100–101, 267 S. E. 2d 435, 437–438 (W. Va. 1980) (duty to arbitrate survives termination of lease); *Warren Brothers Co.* v. *Cardi Corp.*, 471 F. 2d 1304 (CA1 1973) (arbitration clause survives completion of work under construction contract); *Mendez* v. *Trustees of Boston University*, 362 Mass. 353, 356, 285 N. E. 2d 446, 448 (1972) (termination of employment contract "does not necessarily terminate a provision for arbitration or other agreed procedure for the resolution of disputes"); *The Batter Building Materials Co.* v. *Kirschner*, 142 Conn. 1, 10–11, 110 A. 2d 464, 469–470 (1954) (arbitration clause in building contract not affected by a party's repudiation or total breach of contract).

Communications Workers, 475 U. S. 643, 651 (1986). We acknowledge that where an effective bargaining agreement exists between the parties, and the agreement contains a broad arbitration clause, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.*, at 650 (quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582–583 (1960)). But we refuse to apply that presumption wholesale in the context of an expired bargaining agreement, for to do so would make limitless the contractual obligation to arbitrate. Although "'[d]oubts should be resolved in favor of coverage,'" *AT&T Technologies*, *supra*, at 650, we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.

We apply these principles to the layoff grievances in the present case. The layoffs took place almost one year after the Agreement had expired. It follows that the grievances are arbitrable only if they involve rights which accrued or vested under the Agreement, or rights which carried over after expiration of the Agreement, not as legally imposed terms and conditions of employment but as continuing obligations under the contract.

The contractual right at issue, that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal," App. 30, involves a residual element of seniority. Seniority provisions, the Union argues, "create a form of earned advantage, accumulated over time, that can be understood as a special form of deferred compensation for time already worked." Brief for Respondent Union 23–25, n. 14. Leaving aside the

question whether a provision requiring all layoffs to proceed in inverse order of seniority would support an analogy to the severance pay at issue in *Nolde Brothers*, which was viewed as a form of deferred compensation, the layoff provision here cannot be so construed, and cannot be said to create a right that vested or accrued during the term of the Agreement or a contractual obligation that carries over after expiration.

The order of layoffs under the Agreement was to be determined primarily with reference to "other factors such as aptitude and ability." Only where all such factors were equal was the employer required to look to seniority. Here, any arbitration proceeding would of necessity focus upon whether aptitude and ability—and any unenumerated "other factors"—were equal long after the Agreement had expired, as of the date of the decision to lay off employees and in light of Litton's decision to close down its coldtype printing operation.

The important point is that factors such as aptitude and ability do not remain constant, but change over time. They cannot be said to vest or accrue or be understood as a form of deferred compensation. Specific aptitudes and abilities can either improve or atrophy. And the importance of any particular skill in this equation varies with the requirements of the employer's business at any given time. Aptitude and ability cannot be measured on some universal scale, but only by matching an employee to the requirements of an employer's business at that time. We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration.[4]

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[4] Although our decision that the dispute does not arise under the Agreement does, of necessity, determine that as of August 1980 the employees lacked any vested contractual right to a particular order of layoff, the Union would remain able to argue that the failure to lay off in inverse order of seniority if "other things such as aptitude and ability" were equal amounted to an unfair labor practice, as a unilateral change of a term or

V

For the reasons stated, we reverse the judgment of the Court of Appeals to the extent that the Court of Appeals refused to enforce the Board's order in its entirety and remanded the cause for further proceedings.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE SCALIA join, dissenting.

Although I agree with JUSTICE STEVENS' dissent, *post*, I write separately to emphasize the majority's mischaracterization of our decision in *Nolde Bros., Inc.* v. *Bakery Workers*, 430 U. S. 243 (1977). *Nolde* states a broad, rebuttable presumption of arbitrability which applies to *all* post-termination disputes arising under the expired agreement; it leaves the merits of the underlying dispute to be determined by the arbitrator. Today the majority turns *Nolde* on its head, announcing a rule that requires courts to reach the merits of the underlying posttermination dispute in order to determine whether it should be submitted to arbitration. This result is not only unfaithful to precedent but also it is inconsistent with sound labor-law policy.

I

The dispute in *Nolde* concerned whether employees terminated after the expiration of a collective-bargaining agreement were entitled to severance pay under a severance-pay clause of the expired agreement. See *id.*, at 248–249. The Court stated that the severance-pay dispute "hinge[d] on the interpretation [of] the contract clause providing for severance pay" but that "the merits of the underlying claim" were not implicated "in determining the arbitrability of the dispute." *Id.*, at 249. To determine whether the dispute was

condition of employment. We do not decide whether, in fact, the layoffs were out of order.

arbitrable, the Court looked solely to the expired agreement's *arbitration* clause. It found the severance-pay dispute arbitrable because "[t]he parties agreed to resolve *all* disputes by resort to the mandatory grievance-arbitration machinery" and "nothing in the arbitration clause . . . expressly exclude[d] from its operation a dispute which arises under the contract, but which is based on events that occur after its termination." *Id.*, at 252–253.[1] Thus, under *Nolde*, the key questions for determining arbitrability are whether (1) the dispute is "based on . . . differing perceptions of a provision of the expired collective-bargaining agreement" or otherwise "arises under that contract," *id.*, at 249 (emphasis omitted), and, if so, (2) whether the "presumptions favoring" arbitrability have been "negated expressly or by clear implication," *id.*, at 255.

The majority grossly distorts *Nolde*'s test for arbitrability by transforming the first requirement that posttermination disputes "arise under" the expired contract. The *Nolde* Court defined "arises under" by reference to the *allegations* in the grievance. In other words, a dispute "arises under" the agreement where "the resolution of [the Union's] claim hinges on the interpretation ultimately given the contract." *Id.*, at 249.

By contrast, the majority today holds that a postexpiration grievance can be said to "arise under" the agreement only where the court satisfies itself (1) that the challenged action "infringes a right that accrued or vested under the agreement," or (2) that "under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Ante*, at 206. Because they involve inquiry into the substantive effect of the terms of the agreement, these determinations require passing upon the merits of the underlying dispute. Yet the *Nolde* Court

[1] I agree with the majority that the National Labor Relations Board's (Board) determination as to arbitrability under the contract is not entitled to deference. See *ante*, at 202–203.

expressly stated that "in determining the arbitrability of the dispute, the merits of the underlying claim . . . are not before us." 430 U. S., at 249.

Since the proper question under *Nolde* is whether the dispute in this case "arises under" the agreement in the sense that it is "based on . . . differing perceptions of a provision of the expired collective-bargaining agreement," *ibid.*, I have no difficulty concluding that this test is met here. The Union's grievance "claim[ed] a violation of the Agreement," *ante*, at 194, by petitioner's layoffs. And, as even the majority concedes, "[t]he Agreement's unlimited arbitration clause" encompasses any dispute that "arises under the contract here in question." *Ante*, at 205. Thus, the dispute is arbitrable because the "presumptions favoring" arbitrability have not been "negated expressly or by clear implication." 430 U. S., at 255.

In fashioning its more rigorous standard for arbitrability, the majority erroneously suggests that if *Nolde* rendered arbitrable *all* postexpiration disputes about an expired agreement's substantive provisions, it would have the effect of extending the life of the entire contract beyond the date of expiration. See *ante*, at 206. The defect in this view is that it equates *asking* an arbitrator to determine whether a particular contractual provision creates rights that survive expiration with a decision that the provision *does* create such postexpiration rights. The majority evidently fears that arbitrators cannot be trusted to decide the issue correctly. Yet arbitrators typically have more expertise than courts in construing collective-bargaining agreements, and our arbitration jurisprudence makes clear that courts must rely on arbitral judgments where the parties have agreed to do so. Thus in *Nolde*, we carefully avoided expressing any view as to whether the substantive provisions of the expired agreement had any posttermination effect precisely because the parties had expressed their preference for an arbitral, rather

than a judicial interpretation. See *Nolde*, *supra*, at 249, 253.

Consequently, the issue here, as it was in *Nolde*, is not whether a substantive provision of the expired collective-bargaining agreement (in this case the provision covering layoffs) remains enforceable but whether the expired agreement reflects the parties' intent to *arbitrate* the Union's contention that this provision remains enforceable. The majority itself acknowledges a general rule of contract construction by which arbitration or other dispute resolution provisions may survive the termination of a contract. *Ante*, at 208, and n. 3. That is all *Nolde* stands for.[2]

In addition to being without legal foundation, the majority's displacement of *Nolde*'s simple, interpretive presumption with a case-by-case test is unsound from a policy standpoint. Ironically, whereas parties that have agreed to a broad arbitration clause have expressed a preference for "a prompt and inexpensive resolution of their disputes by an expert tribunal," *Nolde*, *supra*, at 254, the majority invites protracted litigation about what rights may "accrue" or "vest" under the contract—litigation aimed solely at determining whether the dispute will be resolved by arbitration. More fundamentally, because the arbitrator is better equipped than are judges to make the often difficult determination of

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[2]The majority "presume[s] as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement." *Ante*, at 208. But the arbitration clause of the expired collective-bargaining agreement does not distinguish among types of disputes that the parties would and would not submit to arbitration. As in *Nolde*, the parties agreed to submit *all* disputes arising under the agreement to arbitration. By looking to the terms of the agreement's layoff provision to draw a conclusion about whether the parties intended rights under that provision to survive termination, the majority is deciding the merits of the dispute rather than the issue of its arbitrability. Notably, the layoff provisions do not contain any language suggesting an intent to preclude posttermination grievances over layoffs from arbitration. See App. 30–31.

the post-termination effect of an expired contract's substantive provisions, the majority's assignment of this task to courts increases the likelihood of error. See *id.*, at 253 ("'The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed,'" quoting *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960)).

II

The majority's resolution of the merits of the contract dispute here reinforces my conviction that arbitrators should be the preferred resolvers of such questions. The Union based its grievance on the following provision of the contract: "[I]n case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." App. 30. The Union's contention that postexpiration layoffs violated this provision rests on the assertion that this contractual provision created rights that survive termination of the contract. The majority rejects this assertion on the ground that "factors such as aptitude and ability do not remain constant, but change over time" and thus "cannot be said to vest or accrue." *Ante*, at 210. This conclusion strikes me as utterly implausible.

As the majority appears to concede, *ante*, at 209–210, and as the Board has held, an unconditional seniority provision can confer a seniority right that is "capable of accruing or vesting to some degree during the life of the contract." *United Chrome Products, Inc.*, 288 N. L. R. B. 1176, 1177 (1988). Obviously, an employee's relative seniority, much like his relative "aptitude and ability," will "change over time." That is, a given member of a bargaining unit who is, for example, 12th in seniority when his collective-bargaining agreement expires may be 5th in seniority at a particular time thereafter, depending upon the number of more senior employees who have departed from the workforce. Or an employee could lose his seniority altogether where specified conditions

for such loss have been met. See, *e. g.*, n. 3, *infra*. The fact that, despite the volatility in individual rank, the seniority guarantee might nevertheless vest under the contract means that what vests is not the employee's seniority rank or his right to job security but rather the right to have the *standard* of seniority applied to layoffs.

In my view, a provision granting only "qualified" seniority may vest in the same way. (Here, the provision guaranteeing seniority is "qualified" by the requirement that the employee claiming seniority possess "aptitude and ability" that is equal to that of less senior employees who seek to avoid being laid off.) As with an employee's seniority rank, a given worker's "aptitude and ability" relative to other employees may change over time, yet the right to have layoffs made according to the *standard* of qualified seniority could vest under the contract. Under this view, a laid off employee would have the opportunity to prove to the arbitrator that he should not have been laid off under the terms of the contract because other factors such as aptitude and ability *were* equal at the time he was laid off.

Indeed, I think this is the more plausible reading of the parties' intent in this case, particularly given related contract provisions involving *loss* of seniority. As the Board has previously held, a contract's

> "failure to specify expiration as one of the ways in which seniority rights could be lost indicates that the parties intended that seniority rights remain enforceable after contract termination. Therefore, the grievance over [the employer's] refusal to recall employees by plantwide seniority . . . involves a right worked for and accumulated during the term of the contract and intended by the parties to survive contract expiration." *Uppco, Inc.*, 288 N. L. R. B. 937, 940 (1988).

In the present case, the expired agreement enumerates six specific ways an employee could lose seniority, and these do

not include termination of the agreement. See App. 31.[3] Thus, the qualified seniority at issue in this case would seem as likely to accrue as did the unconditional seniority in *Uppco*.

In any event, the conclusion that the contracting parties in this case did *not* intend qualified seniority rights to vest is sufficiently implausible as to raise serious questions about the majority's assignment of the task of deciding this interpretive issue to itself. Had the majority left this issue to the arbitrator to decide, as *Nolde* requires, the arbitrator would have had the benefit of an evidentiary hearing on the contractual question and the opportunity to explore petitioner's actual postexpiration seniority practices. The contractual text, alone, may not be the only relevant information in determining the parties' intent. Because arbitrators are better equipped to decide such issues and are more familiar with the "'common law of the shop,'" *Nolde*, *supra*, at 253, quoting *Warrior & Gulf Nav. Co.*, *supra*, at 582, I would have much more confidence in the majority's construction of the contract were that result reached by an arbitrator. In sum, the majority's problematic reasoning regarding the substance of the layoff grievance only underscores the soundness of the *Nolde* presumption of arbitrability which the majority today displaces. Accordingly, I dissent.[4]

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[3] Section 12 of the expired agreement, entitled "Notice of Layoutt" *[sic]*, contains six subsections addressing, *inter alia*, issues of seniority, layoffs, and recalls. Subsection F, which addresses the recalling of laid off workers, enumerates the six ways in which "[a]n employee shall lose his seniority." App. 31. The "seniority" referred to in subsection F reasonably could be construed as the same seniority that is implied in subsection A, concerning layoffs, and that is expressly identified in subsection E, which requires the employer to "supply the Union with an updated seniority list semi-annually," *id.* See *id.*, at 30–31.

[4] Although I believe the parties have a contractual duty to arbitrate in this case, I agree with the majority's conclusion that the Board articulated rational grounds for not imposing a statutory duty under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, to arbitrate grievances aris-

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE SCALIA join, dissenting.

As the Court today recognizes, an employer's obligation to arbitrate postcontract termination grievances may arise by operation of labor law or by operation of the expired collective-bargaining agreement. I think the Court is correct in deferring to the National Labor Relations Board's line of cases and holding that a *statutory* duty to arbitrate grievances does not automatically continue after contract termination by operation of labor law, see *ante*, at 198–203. I also agree with the Court's recognition that notwithstanding the absence of an employer's statutory duty to arbitrate posttermination grievances, a *contractual* duty to arbitrate such grievances may nevertheless exist, see *ante*, at 203–208. I part company with the Court, however, at Part IV–C of its opinion, where it applies its analysis to the case at hand. Because I am persuaded that the issue whether the posttermination grievances in this case "arise under" the expired agreement is ultimately an issue of contract interpretation, I think that the Court errs in reaching the merits of this issue rather than submitting it to an arbitrator in the first instance, pursuant to the broad agreement of the parties to submit for arbitration any dispute regarding contract construction.

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ing after the termination of a collective-bargaining agreement. See *ante*, at 200–201. In *Indiana and Michigan Electric Co.*, 284 N. L. R. B. 53 (1987), the Board noted that "an agreement to arbitrate is a product of the parties' mutual consent to relinquish economic weapons, such as strikes or lockouts" and therefore the contractual obligation to arbitrate could be distinguished from other "terms and conditions of employment routinely perpetuated [after termination of a collective-bargaining agreement] by the [statutory] constraints of [the unilateral change doctrine]." *Id.*, at 58. Under § 13 of the Act, 29 U. S. C. § 163, the Act may not be construed to interfere with a union's right to strike. Therefore, the Board rationally concluded that employers should not, as a matter of statutory policy, be compelled to arbitrate and thus forbear from using their economic weapons, when no concomitant statutory obligation can be imposed on a union.

In *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U. S. 243 (1977), a union brought suit against an employer to compel arbitration of the employer's refusal to give severance pay under an expired collective-bargaining agreement to employees displaced by a plant closing. The expired agreement provided that employees who had worked for the employer for at least three years were entitled to severance pay if permanently displaced from their jobs. The union claimed that the right to such severance pay had "accrued" or "vested" during the life of the contract. The employer disavowed any obligation to arbitrate, arguing that the contract containing its commitment had terminated and the event giving rise to the dispute—the displacement of employees during the plant closing—occurred after the contract had expired.

We ruled in favor of the union in *Nolde Brothers*. Integral to our decision was the conclusion that whether or not the right to severance pay had accrued during the contract, and thus whether or not the employer's refusal to offer severance pay was an arbitrable grievance after the contract had expired, was itself a question of contract interpretation. "There can be no doubt that a dispute over the meaning of the severance-pay clause during the life of the agreement would have been subject to the mandatory grievance-arbitration procedures of the contract. Indeed, since the parties contracted to submit 'all grievances' to arbitration, our determination that the Union was 'making a claim which on its face is governed by the contract' would end the matter had the contract not been terminated prior to the closing of the plant." *Id.*, at 249–250 (citation omitted).

Like the expired agreement between the union and Nolde Brothers to arbitrate "all grievances," the terminated agreement between Litton and the Union in this case broadly mandates arbitration of "'[d]ifferences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement.'" *Ante*,

at 194. Because the Union here *alleged* that the seniority clause of the expired agreement was on its face violated by the posttermination layoffs, determining whether the union's grievances arise under the contract requires construction of the seniority provision of the contract and determination of whether this provision applies to posttermination events. As the Court itself notes: "[T]he Board's decision not to order arbitration of the layoff grievances *rests upon its interpretation of the Agreement.*" *Ante*, at 202 (emphasis added).

In my opinion, the question whether the seniority clause in fact continues to provide employees with any rights after the contract's expiration date is a separate issue concerning the merits of the dispute, not its arbitrability. Whatever the merits of the Union's contention that the seniority-rights provision survives the contract's termination date, I think that the merits should be resolved by the arbitrator, pursuant to the parties' broad contractual commitment to arbitrate all disputes concerning construction of the agreement, rather than by this Court.

I respectfully dissent.

Syllabus

OKLAHOMA ET AL. *v.* NEW MEXICO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 109, Orig. Argued April 16, 1991—Decided June 17, 1991

The Canadian River flows through New Mexico and the Texas Panhandle before entering Oklahoma. Its waters are apportioned among these States by the Canadian River Compact. Article IV(a) of the Compact gives New Mexico free and unrestricted use of all waters "originating" in the river's drainage basin above Conchas Dam—a structure that predates the Compact and provides water to the Tucumcari project, a federal reclamation project—and IV(b) gives it free and unrestricted use of waters "originating" in the river's drainage basin below that dam, limiting the "conservation storage" for impounding those waters to 200,000 acre-feet. In 1963, New Mexico constructed Ute Dam and Reservoir downstream from Conchas Dam. In 1984, Ute Reservoir was enlarged, giving it a storage capacity of 272,800 acre-feet, which has been reduced to about 237,900 feet because of silting. Oklahoma and Texas filed this litigation, contending that Article IV(b)'s limitation is imposed on reservoir *capacity* available for conservation, and that capacity for the so-called "desilting pool" portion of Ute Reservoir was not exempt from that limitation because it was not allocated solely to "sediment control." In 1987, while the case was pending, the river above Conchas Dam flooded, spilling over that dam, and Ute Reservoir caught a sufficient amount of spill waters to exceed 200,000 acre-feet. When New Mexico refused to count the spill waters for purposes of the limitation, Texas and Oklahoma filed a supplemental complaint, claiming that if the limitation applies to actual *stored* water, then water spilling over Conchas Dam or seeping back from the Tucumcari project constitutes waters originating below Conchas Dam under Article IV(b). As relevant here, the Special Master's Report recommended that (1) Article IV(b) imposes a limitation on stored water, not physical reservoir capacity (Part VI of the Report); (2) water originating in the river basin above Conchas Dam but reaching the river's mainstream below that dam as a result of spills or releases from the dam or seepage and return flow from the Tucumcari project are subject to the Article IV(b) limitation (Part VII); (3) the issue whether, and to what extent, the water in Ute Reservoir's "desilting pool" should be exempt from the Article IV(b) limitation should be referred to the Canadian River Compact Commission for negotiations and possible resolution (Part VIII); and (4) if the recommendations are approved, New Mexico will have been in violation of Article IV(b) since 1987, and the

case should be returned to the Special Master for determination of any injury to Oklahoma and Texas and recommendations for appropriate relief. The States have filed exceptions.

Held:

1. Oklahoma's exception to the recommendation in Part VI of the Master's Report is overruled. Nothing on the Compact's face indicates a clear intention to base New Mexico's limitation on available reservoir capacity when Texas' limitation is based on stored water. Early drafts uniformly referred to stored water, and the contemporaneous memoranda and statements of Compact Commissioners and their staffs do not explain why a change to "storage capacity" was made in the final draft, although it is most probable the terms were being used loosely and interchangeably. Pp. 229–231.

2. Also overruled are New Mexico's exceptions to the recommendation in Part VII of the Report. New Mexico errs in arguing that the term "originating" is unambiguous, and that there are no restrictions on the impoundment of the spill waters, since they are waters originating above Conchas Dam, to which the State has free and unrestricted use under Article IV(a). Rather, the Special Master correctly concluded that the Compact's drafters intended in Article IV(a) to give New Mexico free and unrestricted use of waters "originating" in the river's drainage basin above Conchas Dam *only if* the waters were stored, used, or diverted for use at or above Conchas Dam. There is substantial evidence that, in drafting the Compact, Texas and Oklahoma agreed that storage limits were not necessary for waters above Conchas Dam because the waters in that basin had been fully developed, that any future water development would necessarily occur below that dam, and that 200,000 acre-feet of storage rights would satisfy all of New Mexico's future needs below the dam. The Compact's ambiguous use of the term "originating" can be harmonized with the drafters' apparent intent only if it is interpreted so that waters spilling over or released from Conchas Dam, or returned from the Tucumcari project, are considered waters *originating below* Conchas Dam. Thus, any water stored in excess of the 200,000 acre-feet limit should have been allowed to flow through Ute Dam for use by the downstream States, rather than being impounded by New Mexico. Pp. 231–240.

3. Texas' and Oklahoma's exception to the recommendation in Part VIII of the Report is sustained insofar as those States argue that the "desilting pool" issue should not be referred to the Commission. There was no legal basis for the Master's refusing to decide whether the water in the desilting pool should be counted towards the Article IV(b) limitation, since a dispute clearly exists in this case, and since there is no claim that the issue has not been properly presented. *Arizona* v. *California*,

373 U. S. 546. Thus, the matter must be remanded to the Master for such further proceedings as may be necessary and a recommendation on the merits. Pp. 240–241.

Exceptions sustained in part and overruled in part, and case remanded.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Parts III and V, in which MARSHALL, BLACKMUN, STEVENS, and SOUTER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined, *post*, p. 242.

Marian Matthews, Deputy Attorney General of New Mexico, argued the cause for defendant. On the briefs were *Thomas S. Udall*, Attorney General, *Hal Stratton*, former Attorney General, and *Eric Richard Biggs* and *Martha C. Franks*, Special Assistant Attorneys General.

D. Paul Elliott, Assistant Attorney General, argued the cause for plaintiff State of Texas. With him on the briefs were *Dan Morales*, Attorney General, *Jim Mattox*, former Attorney General, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *Nancy N. Lynch*, Assistant Attorney General.

R. Thomas Lay argued the cause for plaintiff State of Oklahoma. With him on the briefs were *Robert H. Henry*, Attorney General, *Brita E. Haugland-Cantrell*, Assistant Attorney General, and *James R. Barnett*.

JUSTICE WHITE delivered the opinion of the Court.

This case, an original action brought by the States of Oklahoma and Texas against the State of New Mexico, arises out of a dispute over the interpretation of various provisions of the Canadian River Compact (Compact), which was ratified by New Mexico, Oklahoma, and Texas in 1951 and consented to by Congress by the Act of May 17, 1952, 66 Stat. 74. Each State has filed exceptions to a report submitted by the Special Master (Report) appointed by this Court.

I

The Canadian River[1] is an interstate river which rises along the boundary between southeastern Colorado and northeastern New Mexico, in the vicinity of Raton, New Mexico. From its headwaters, the Canadian River flows south to the Conchas Dam in New Mexico, then generally east for 65 river miles to the Ute Reservoir in New Mexico, and then into the Texas Panhandle. After traversing the panhandle, the river flows into Oklahoma where it eventually empties into the Arkansas River, a tributary of the Mississippi.

In the late 1930's, Congress authorized, and the Corps of Engineers completed, the construction of Conchas Dam on the mainstream of the Canadian River, approximately 30 miles northwest of Tucumcari, New Mexico. Congress also authorized the Tucumcari project, a federal reclamation project designed to irrigate over 42,000 acres of land and serve the municipal and industrial needs of Tucumcari, New Mexico. The project lands are situated southeast of Conchas Dam and are served by the Conchas Canal, which diverts water from Conchas Reservoir. The project was completed in 1950.

In 1949, the Texas congressional delegation proposed that Congress authorize a massive Canadian River reclamation project, known as the Sanford project because of its proximity to Sanford, Texas, for the purpose of serving the municipal and industrial requirements of 11 Texas cities in the Texas Panhandle region. Legislation to authorize the Sanford project was introduced in the House of Representatives, along with a bill authorizing New Mexico, Oklahoma, and Texas to negotiate an interstate compact to equitably appor-

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[1] At least one source suggests that the Canadian River was so named "by early French traders and hunters from Canada who followed it west into Spanish territory. The Fort Smith and Santa Fe pioneer trails went through the Canadian River Valley." 2 Encyclopaedia Britannica 789 (15th ed. 1985).

tion the waters of the Canadian River. The legislation authorizing the States to enter into an interstate compact was passed by Congress, and the Canadian River Compact Commission was created. The Compact Commission consisted of one commissioner from each State and one federal representative. Each commissioner and the federal representative had the assistance of engineering advisers, a group collectively known as the Engineering Advisory Committee. This committee submitted several proposals to the Compact Commission. The final draft of the Canadian River Compact was presented on December 6, 1950, and was signed on that day by the members of the Compact Commission.[2]

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[2] The Compact provides in pertinent part as follows:

"Article I

"The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

"Article II

"As used in this Compact:

"(a) the term 'Canadian River' means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

. . . . . .

"(d) The term 'conservation storage' means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

. . . . . .

"Article IV

"(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

"(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage

Congress enacted legislation authorizing the Sanford project on December 29, 1950, but as a result of an amendment proposed by the New Mexico delegation, the bill specifically provided that actual construction of the project could not commence until Congress consented to the Compact. See 64 Stat. 1124, 43 U. S. C. § 600c(b). That consent was granted on May 17, 1952, 66 Stat. 74, and the Sanford Dam, creating Lake Meredith Reservoir with a capacity of over 1.4 million acre-feet of water, was completed in 1964. Lake Meredith is approximately 165 river miles east of Ute Reservoir and is located north of Amarillo, Texas. During the 1950's, New Mexico selected a site on the Canadian River mainstream approximately 1 mile west of Logan, New Mexico, and about 45 miles downstream from Conchas Dam for the construction of Ute Dam and Reservoir. Construction of Ute Dam was completed in 1963, with an initial storage capacity of 109,600 acre-feet. In 1982, New Mexico began construction to enlarge the reservoir, and, in 1984, the enlargement was completed, giving Ute Reservoir a capacity of 272,800 acre-feet. In 1984, the reservoir's actual capacity to store water was 246,617 acre-feet, the remaining capacity being occupied by silt. The Special Master estimated that because of additional silting, reservoir storage capacity was reduced to 241,700 acre-feet in 1987 and currently is about 237,900 acre-feet. Report of Special Master 16–17.

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basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

. . . . .

"Article VII

"The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V . . . .

"Article VIII

"Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact."

As early as 1982, Oklahoma and Texas expressed concern that the enlargement of Ute Reservoir would violate the 200,000 acre-feet limitation in Article IV(b) of the Compact. See n. 2, *supra*. All attempts by the Commission to resolve this budding dispute were unsuccessful, in large part because any Commission action requires a unanimous vote and New Mexico would not agree to the interpretation of the Compact proposed by Oklahoma and Texas. This litigation followed, with Oklahoma and Texas contending that Article IV(b) of the Compact imposes a 200,000 acre-feet limit on New Mexico's constructed reservoir *capacity* available for conservation storage downstream from Conchas Dam, and that capacity for the so-called "desilting pool" portion of Ute Reservoir was not exempt from the Article IV(b) limitation because it was not allocated solely to "sediment control."

In the spring of 1987, while the case was pending, the portion of the Canadian River above Conchas Dam flooded, and a sizeable quantity of water, approximately 250,000 acre-feet, spilled over Conchas Dam. This was the first major spill over Conchas Dam since 1941–1942, a spill which predated the Compact. New Mexico caught approximately 60 percent of the spill in Ute Reservoir, which filled the reservoir to its capacity, and the remaining 40 percent flowed on down the river. As of June 23, 1988, Ute Reservoir contained approximately 232,000 acre-feet of stored water, of which some 180,900 acre-feet was alleged by New Mexico to be flood water spilled from Conchas Dam earlier in 1987. Report of Special Master 47.

After New Mexico refused to count the spill waters stored in Ute Reservoir for purposes of the 200,000 acre-feet limitation in Article IV(b), Texas and Oklahoma filed a supplemental complaint in this case, claiming that if the 200,000 acre-feet limitation applies to actual *stored* water, then water spilling over Conchas Dam or seeping back from the Tucumcari project constitutes "waters which originate . . . below Conchas Dam" within the meaning of Article IV(b). New

Mexico disputed all of these contentions and argued that water which first enters the river above Conchas Dam is not subject to the Article IV(b) limitation even if it is stored in Ute Reservoir, or anywhere else in New Mexico below Conchas Dam.

We referred Texas' and Oklahoma's complaint and supplemental complaint in this original case to a Special Master. 484 U. S. 1023 (1988); 488 U. S. 989 (1988). After considering voluminous evidence, the written submissions of the States, twice hearing extended oral argument on the issues, and circulating a draft report to the States for their comments, the Master filed a Report on October 15, 1990, making the following recommendations relevant to our decision in this case:

(1) Article IV(b) imposes a limitation on stored water, not physical reservoir capacity.

(2) Waters originating in the Canadian River Basin above Conchas Dam, but reaching the mainstream of the Canadian River below Conchas Dam as a result of spills or releases from Conchas Dam or seepage and return flow from the Tucumcari project, are subject to the Article IV(b) limitation.

(3) The issue whether, and to what extent, the water in the "desilting pool" in Ute Reservoir should be exempt from the Article IV(b) limitation should be referred to the Canadian River Compact Commission for good-faith negotiations and possible resolution. The referral would be without prejudice to later invoke the Court's jurisdiction if the issue cannot be resolved within one year.

(4) If the foregoing recommendations are approved, New Mexico will have been in violation of Article IV(b) of the Compact since 1987, and the case should be returned to the Special Master for determination of any injury to Oklahoma and Texas and recommendations for appropriate relief. Report, at 24–25.

The Master also recommended that the Court use this case to articulate various jurisdictional prerequisites and proce-

dural guidelines for application in future interstate compact litigation. *Id.*, at 26–34.[3]

We ordered the Master's Report to be filed and set a briefing schedule, 498 U. S. 956 (1990), and heard oral argument on the States' exceptions to the Master's Report. We now address those exceptions in turn.

II

Oklahoma has filed an exception to the Master's recommendation in Part VI of his Report that the Article IV(b) limitation on "conservation storage" be interpreted to apply only to the quantity of water New Mexico actually stores at Ute Reservoir for conservation purposes. As of 1984, Ute Reservoir had a storage capacity of approximately 272,800 acre-feet, although it is conceded that not all of that capacity is chargeable as existing for "conservation storage." Some of the capacity is for purposes excluded from the Compact definition of "conservation storage," such as for sediment control. Oklahoma contends that the term "conservation storage" should be interpreted to apply to the *physical capacity* of reservoirs located below Conchas Dam, a view which, if adopted, would result in a finding that New Mexico has been in violation of Article IV(b) since at least 1984, when the enlargement of Ute Reservoir was completed.

The Special Master conceded, as do we, that Oklahoma's suggested interpretation of Article IV(b)'s conservation storage limitation finds some support in the plain language of the Compact definition of "conservation storage" and in the language of Article IV(b) itself. The Compact defines "conservation storage" in pertinent part as "that portion of the *capacity* of reservoirs available for the storage of water" for various purposes and "excludes any portion of the *capacity* of

[3] For example, the Master recommended that state attorneys general seeking to invoke the Court's jurisdiction, or responding to such a request, certify that their States had negotiated in good faith in an attempt to resolve the dispute without resort to the Court. Report, at 32–33.

reservoirs" allocated to other purposes. Art. II(d) (emphasis added). Likewise, Article IV(b) refers to "the amount of conservation storage in New Mexico *available* for impounding these waters." (Emphasis added.) However, other provisions in the Compact appear to focus on *stored* water, not reservoir capacity. For example, Article V sets forth an elaborate formula for determining the amount of water Texas may *actually impound* at any one time; Article VII provides that the "Commission may permit *New Mexico to impound more water than the amount set forth in Article IV*" (emphasis added); and Article VIII requires each State to "furnish to the Commission at intervals designated by the Commission accurate records of the *quantities of water stored in reservoirs* pertinent to the administration of this Compact." (Emphasis added.)

We agree with the Special Master that nothing on the face of the Compact indicates a clear intention to treat the New Mexico "conservation storage" limitation differently from the Texas stored water limitation, and we see no compelling justification for doing so. In fact, several early drafts of the Compact uniformly referred to *stored* water, and only in the final draft did the "conservation storage" language appear in Article IV(b). There is nothing in the contemporaneous memoranda and statements of the Compact Commissioners and their staffs to explain exactly why this change was made; nor is there anything which indicates an intent to draw a distinction between the limitations placed on New Mexico and those placed on Texas. Rather, as the Master pointed out, it is most probable that the terms "stored water," "storage," and "conservation storage capacity" were being used loosely and interchangeably by the drafters and their staffs. See Report, at 42–43.

There is no obvious reason why Texas and Oklahoma would have wanted to restrict New Mexico's ability to increase reservoir *capacity* below Conchas Dam, particularly in light of the fact that larger reservoirs actually promote one of the

purposes stated in Article I of the Compact, which is to capture and conserve as much of the Canadian River's flood flows as possible, flows which might otherwise be dissipated and therefore wasted. Furthermore, as New Mexico points out, sedimentation alone would constantly reduce New Mexico's storage capacity below the 200,000 acre-feet limit, forcing New Mexico to repeatedly either build new reservoir capacity or enlarge existing reservoirs. Either of those options would be extremely expensive, and Oklahoma points to no persuasive evidence that the drafters of the Compact intended that New Mexico should bear such a burden. We overrule Oklahoma's exception to Part VI of the Master's Report.

III

New Mexico has excepted to Part VII of the Master's Report, in which the Master recommended that water spilling or released from Conchas Dam, as well as return flow and seepage from the Tucumcari project, be subject to Article IV(b)'s 200,000 acre-feet limitation on conservation storage, if the water is impounded in Ute Dam or other downstream dams in New Mexico. New Mexico argues that the Compact does not impose any restriction on New Mexico's impoundment of these waters because they *originate above* Conchas Dam, and Article IV(a) gives New Mexico the "free and unrestricted use of all waters *originating* in the drainage basin of Canadian River *above* Conchas Dam." (Emphasis added.) Texas and Oklahoma counter that the word "originating," as used in Article IV of the Compact, simply means "entering." See Tr. of Oral Arg. 29. In Texas' and Oklahoma's view, all the conservation storage waters which end up in Ute Reservoir, whether they spill over or are released through Conchas Dam, or seep back from the Tucumcari project, are subject to the 200,000 acre-feet conservation storage limitation of Article IV(b) because they "originate" below Conchas Dam. The Special Master recommended that such waters be subject to the Article IV(b) limitation because he concluded that

the intent of the Compact drafters was to give New Mexico free and unrestricted use of waters originating in the Canadian River drainage basin above Conchas Dam *only if* the waters were "stored, used or diverted for use *at or above Conchas Dam.*" Report, at 59.

New Mexico asserts that the word "originating" as used in Article IV has a plain, unambiguous meaning and that the waters "originating" below Conchas Dam referred to in Article IV(b) do not include any waters "originating" above Conchas. But we do not agree that the meaning of the word is as plain as New Mexico suggests. As the Special Master pointed out, a literal reading of the language of Article IV(a) could not have been intended since such a reading would include all of the waters originating in the drainage basin of the Canadian River above Conchas Dam, including all of the waters in tributaries that arise in Colorado, such as the Vermejo River, and would purport to foreclose any claim that Colorado had in the waters arising in that State. This would be an extremely implausible reading in light of the fact that Colorado was not a party to the Compact.

New Mexico's answer is that the language of Article IV(a), giving it the right to all Canadian River waters originating above Conchas, does not mean what it says and should be interpreted to include only those waters in the drainage basin "originating" in New Mexico, a limitation that appeared in earlier drafts of the Compact and that was reflected in the legislative history of the Act approving the Compact. S. Rep. No. 1192, 82d Cong., 2d Sess., 2 (1952). But as Texas points out, New Mexico nevertheless claims the right to use and store all of the water in the Canadian River that is found in New Mexico above Conchas Dam, even though some of it admittedly has its source in Colorado, not in New Mexico, a result unsupported by New Mexico's present interpretation of the language in Article IV(a). Likewise, if literally read, Article IV(a) would retain New Mexico's right to water having a source above Conchas even if the water escaped its

grasp and flowed into Texas; but New Mexico concedes that the Article does not go so far, if for no other reason than the fact that Article V gives Texas the right to all of the water found in the Canadian River in Texas, subject to a storage limitation.

In light of the above ambiguity, which the dissent refuses to recognize, it is fairly arguable that if, by virtue of its right to water originating in the drainage basin in New Mexico above Conchas Dam, New Mexico also has the right to use and store water in the Canadian River in New Mexico that originated in Colorado, Article IV(b) should be construed in the same way: Any water found in the river below Conchas, including spills, seepage, and return flow from Tucumcari, must be deemed to have originated below Conchas and be subject to the 200,000 acre-feet storage limitation. In effect, this was the conclusion the Special Master came to after examining in detail the purpose and negotiating history of the Compact.[4]

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[4] In anticipation of congressional authorization to enter into a compact, the three States each appointed a compact commissioner in the fall of 1949. The Compact Commission met for the first time in February 1950 to lay the groundwork for future deliberations. At that meeting, the Commissioners agreed that no specific proposals would be considered until the relevant technical data was collected and studied. On April 29, 1950, Congress authorized the States to negotiate a compact and, approximately one month later, Berkeley Johnson was appointed to the Compact Commission as the federal representative and chairman of the Commission. Johnson then selected Raymond Hill as his engineering adviser.

The first official meeting of the Compact Commission was an organizational meeting held on June 30, 1950. Hill was named chairman of the Engineering Advising Committee, made up of three engineer advisers serving their respective Commissioners. Over the next several months, the engineer advisers conducted studies and collected data. In early October, the Compact Commission convened for its second formal meeting and received a report from Hill regarding his committee's proposals regarding a compact. The Compact Commission approved in principle the formulas developed by the engineers and directed their legal advisers to prepare a draft compact. Hill then prepared a memorandum to the legal advisers in which he recommended that New Mexico be given "free and unrestricted use of

The Master reviewed considerable evidence regarding the drafters' intent as to the meaning of Article IV and concluded that New Mexico's suggested interpretation was not consist-

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all waters in the drainage basin of Canadian River in New Mexico" subject only to a 50,000 acre-feet conservation storage limitation in the drainage basin "above Conchas Reservoir." Defendant's Exh. 30, Exh. B, pp. 3–4. By early November, the Texas commissioner had expressed a strong desire to have a final compact draft by December 6, 1950, so that Congress could authorize the Sanford project during a month-long legislative session which was to begin in late November. The legal advisers, working with Raymond Hill and the engineers, submitted a partial draft compact dated November 14. This draft adopted Hill's suggested language with regard to New Mexico's rights to Canadian River water; but because the legal advisers had not been able "to satisfactorily word" the compact article dealing with storage limitations, they were left to be defined later. *Id.*, Exh. C, p. 3.

The Compact Commission held its third official meeting December 4–6, 1950. On December 5, the draft compact was substantially revised by Raymond Hill and the legal advisers to reflect changes in the engineers' storage limitation formulas. This draft provided that New Mexico should have the "free and unrestricted use of all waters of the Canadian River in New Mexico, subject to" a 200,000 acre-feet storage limitation on waters "which originate in the drainage basin of the Canadian River below Conchas Dam." *Id.*, Exh. F, p. 2. The draft was again revised either later on December 5 or during the morning of December 6. The final draft included for the first time the "originating . . . above Conchas Dam" language which is now a focal point of the States' dispute in this case. No contemporaneous explanation was provided for this last-minute revision. The final draft was presented to the Compact Commission on December 6 at 11:15 a.m., and, after making some minor revisions, the Commissioners signed the draft at 1:00 p.m., prompting Chairman Johnson to comment that the speed with which the "compact reached the signing stage . . . certainly constituted a record." Plaintiffs' Exh. 110, p. 1. The Master viewed the process somewhat less charitably, observing that "the record of the Compact negotiations and the issues raised in this litigation vividly demonstrate that, as Benjamin Franklin observed, 'haste makes waste.'" Report, at 54.

After the Compact had been signed, Chairman Johnson asked Hill to prepare, as an interpretive tool, a memorandum providing a detailed explanation of the various articles of the Compact. See Plaintiffs' Exh. 140. As evidence of the need for such a document, Johnson described a recent

ent with the available evidence.[5] Although the question is not free from doubt, we agree with the Master. Contrary to New Mexico's assertions, there is substantial evidence that, in drafting the Compact, Texas and Oklahoma agreed that storage limitations were not necessary for waters above Conchas Dam because the waters in that basin had been fully developed. "[T]he negotiators recognized that full development had already been made of all waters of Canadian River originating above Conchas Dam and that accordingly there

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discussion involving New Mexico's Compact Commissioner and representatives of the Bureau of Reclamation and Corps of Engineers in which three different positions were taken on the interpretation of the Compact's allotment of water to Texas. Hill then prepared a memorandum entitled "Development of Final Wording of Compact," dated January 29, 1951 (the "Hill Memorandum"), see Plaintiffs' Exh. 38, and the Compact Commission approved the Hill Memorandum at its fourth and final official meeting on January 31, 1951.

[5] We agree with the Master that it is appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret Article IV. We previously have pointed out that a congressionally approved compact is both a contract and a statute, *Texas* v. *New Mexico*, 482 U. S. 124, 128 (1987), and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous, *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 511 (1989); *Pierce* v. *Underwood*, 487 U. S. 552, 564–565 (1988); *Blum* v. *Stenson*, 465 U. S. 886 (1984). Furthermore, we have on occasion looked to evidence regarding the negotiating history of other interstate compacts. See, *e. g.*, *Texas* v. *New Mexico*, 462 U. S. 554, 568, n. 14 (1983); *Arizona* v. *California*, 292 U. S. 341, 359–360 (1934). Thus, resort to extrinsic evidence of the compact negotiations in this case is entirely appropriate.

New Mexico agrees that it is proper to use "negotiating history to determine whether the words of this Compact can be interpreted reasonably in accordance with their context," Brief for New Mexico 8, n. 1, but contends that the Master used the negotiating history to "delete Compact language," *ibid.*, rather than to "interpret" the language. Essentially, New Mexico simply disagrees with the Master that the term "originating" as used in Article IV is ambiguous. Because we agree with the Master, evidence regarding the negotiating history of the Compact may be considered in interpreting Article IV even under New Mexico's view of the relevant legal principles.

would be no purpose in placing a limitation upon any increase in the amount of storage of such waters." Joint Statement of Agreed Material Facts D.34. The evidence strongly suggests that the negotiators believed that any future water development along the Canadian River in New Mexico would necessarily occur below Conchas Dam, and that 200,000 acre-feet of storage rights would be ample for New Mexico's purposes below Conchas Dam. Indeed, in a letter to the Governor, New Mexico's Compact Commissioner, John Bliss, specifically stated that "storage capacity for all projects which may be feasible below Conchas will probably not equal the 200,000 acre foot storage limit."[6] Plaintiffs' Exh. 30, p. 1.

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[6] New Mexico attempts to rely on the fact that in a letter written to Senator Anderson of New Mexico, Bliss indicated that the only restriction on New Mexico's use of Canadian River water was that "the total storage capacity for conservation purposes of the waters rising below the dam *(not including spills)* shall not exceed 200,000 acre feet." Plaintiffs' Exh. 28 (emphasis added). New Mexico argues that this letter proves that Bliss did not construe the Compact as placing any limitation on New Mexico's right to store and use waters which flooded over Conchas Dam. But, like the Master, we fail to see that this single letter proves nearly so much.

First, it is not at all clear that an ordinary reading of the letter compels the conclusion for which New Mexico argues. At least as plausible as New Mexico's reading is the interpretation that Bliss did not understand the Compact as giving New Mexico any rights to store or use such spill waters. This reading is consistent with the plain language of the letter and extrinsic evidence such as the fact noted in the text, *infra*, at 237–238, that the engineers advising the Compact Commission included spills from Conchas Dam in their estimates of the water supply available to Texas.

Second, there is no indication that Bliss ever transmitted the view that New Mexico now claims he held to the other commissioners or the relevant New Mexico state officials such as the Governor and state legislature. In fact, in his letter to Governor Mabry, Bliss never mentions the issue of spills and instead indicates that the 200,000 acre-feet storage limitation imposed "little or no restriction" on any water development projects in the State. Plaintiffs' Exh. 30, p. 1. Bliss' subsequent letter to Governor Mechem was very similar. See Plaintiffs' Exh. 40. It is beyond cavil that statements allegedly made by, or views allegedly held by, "those engaged

The central purpose of the Compact was to settle the respective rights of the States to Canadian River water; and the Compact and its negotiating history plainly show that the parties agreed that no more than 200,000 acre-feet of storage rights would satisfy all of New Mexico's future needs for water below Conchas Dam. Had they thought more was needed, the limit would have been higher. Under these circumstances, we see no persuasive reason why Texas and Oklahoma would have agreed to let New Mexico impound substantially more than 200,000 acre-feet of water for conservation storage purposes below Conchas Dam simply because some of the water first entered the river above Conchas Dam. Nor do we believe that the evidence supports the conclusion that New Mexico's negotiator intended that result either.

In our view, the Compact's ambiguous use of the term "originating" can only be harmonized with the apparent intent of the Compact drafters if it is interpreted so that waters which spill over or are released from Conchas Dam, or which return from the Tucumcari project, are considered waters *originating below* Conchas Dam. This view is strengthened by the fact that both the Bureau of Reclamation in studying the Sanford project, and the engineers advising the Compact commissioners during negotiations, included outflows and spills from Conchas Dam in their estimates of the water supply available to Texas.[7] See Joint Statement of Agreed Ma-

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in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body," *Arizona* v. *California*, *supra*, at 360, are of little use in ascertaining the meaning of compact provisions.

[7] The Bureau of Reclamation, which played a significant role in providing data to the Compact Commission, interpreted the completed Compact as not entitling New Mexico to retain spills from Conchas Dam. A 1954 Bureau Report on the Sanford project stated that "[e]xcept for the contribution received from such spills [referring to Conchas Dam spills], the water supply for the Canadian River Project therefore must be obtained from runoff originating in the portion of the Canadian River Basin between

terial Facts C.7, D.16. New Mexico points out that the States and the Master agree that nothing in Article IV would prevent New Mexico from simply enlarging Conchas Reservoir to capture all of the waters flowing into the river above Conchas Dam. See Tr. of Oral Arg. 6. That reading of the Compact is correct, but we fail to see how it refutes Texas' and Oklahoma's interpretation of the Compact. New Mexico apparently has never attempted to enlarge Conchas Reservoir because doing so is economically infeasible, and there is nothing in the evidence to suggest that the drafters contemplated that New Mexico would seek to enlarge Conchas Reservoir in the future. Instead, as noted above, the Compact drafters were operating on the assumption that New Mexico had fully developed its uses of water above Conchas Dam and would not need additional water for above Conchas uses. It does not necessarily follow that New Mexico's entitlement under Article IV(a) to all of the Canadian River water it can use from Conchas Reservoir gives New Mexico the unrestricted right to store that water at any point downstream from Conchas Dam. Any right New Mexico has to water spilling over Conchas Dam arises by virtue of Article IV(b), under which New Mexico may store for its use 200,000 acre-feet of water originating below Conchas Dam.[8]

Conchas Dam and Sanford Dam site . . . ." Plaintiffs' Exh. 101, p. 50. The 1954 report, as well as a 1960 Bureau Report, see Plaintiffs' Exh. 102, pp. 56, 58, make clear that the Bureau reads Article IV(b) as limiting New Mexico's storage of any water below Conchas Dam, including water which spills over Conchas Dam.

[8] An argument can be made that if the water originating below Conchas excludes any water coming out of or over Conchas, New Mexico is not entitled to store any such water, for Article IV(b) limits storage below Conchas Dam to those waters originating below that dam. Furthermore, the Hill memorandum, see n. 5, *supra*, indicates that the Commissioners negotiating the Compact anticipated that the storage permitted below Conchas would not be on the main stream but on the tributaries, and that 200,000 acre-feet would be sufficient to regulate those minor streams. See Plaintiffs' Exh. 38, p. 3. Obviously, under this reading of Article IV(b), Conchas spills would have to pass downstream to the Sanford project. Al-

It is worth noting the Special Master's observation that New Mexico's construction of Article IV, if accepted, would have a deleterious impact on the water supply to the Sanford project and hence would "run counter to the Congressional intention in conditioning funding of the Sanford Project on execution of the Compact and in subsequently approving the Compact." Report, at 57. Congress had been informed that the project would rely in part on water arriving in Texas in the mainstream of the Canadian. Yet New Mexico's version of the Compact would, as a practical matter, permit it to prevent any and all water entering the river above Conchas from ever reaching Texas, whether by enlarging Ute Reservoir or building additional facilities, and at the same time to impound at Ute Dam most if not all of the principal tributary inflow below Conchas.

All of New Mexico's needs for water above Conchas and for the Tucumcari project are fully satisfied. No one suggests otherwise. It is also plain that it was agreed in the Compact that 200,000 acre-feet of water storage would be adequate to satisfy New Mexico's needs for water below Conchas. That allocation was indeed generous. Since the signing of the Compact, there have been no developments in the area below Conchas which require substantial amounts of water for consumptive uses. According to the Special Master, slightly over 1,000 acre-feet for such purposes has been sold from Ute Dam since 1963. *Id.*, at 68. New Mexico is entitled to 200,000 acre-feet of conservation storage below Conchas Dam, which the Compact anticipated would take care of any future developments in the area below Conchas Dam. As we construe the Compact, if New Mexico has at any time stored more than that amount, it was not entitled to do so. Any water stored in excess of that amount should have been

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though there are traces of these arguments in Texas' response to New Mexico's exceptions, Texas does not challenge New Mexico's entitlement to store Conchas spills in Ute Dam so long as the total storage in that reservoir does not exceed 200,000 acre-feet.

allowed to flow through the Ute Dam, to be put to use by the downstream States, rather than impounded in New Mexico.

Accordingly, we overrule New Mexico's exceptions to Part VII of the Report.[9]

IV

In Part VIII of his Report, the Master recommended that this Court remand to the Canadian River Commission the question whether certain water stored in Ute Reservoir, water which New Mexico has designated a "desilting pool,"[10] is exempt from the Article IV(b) limitation on New Mexico's conservation storage because it allegedly serves a "sediment control" purpose within the meaning of Article II(d). Oklahoma and Texas except to this recommendation, arguing that there is sufficient evidence in the record to make a final determination on this issue, that the water in the desilting pool should be counted towards the Article IV(b) limitation, and that it is neither appropriate nor practical to refer the

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[9] New Mexico also argues that the Master improperly shifted the burden of proof to New Mexico on the "above Conchas" issue, see Brief for New Mexico 26–28, but this exception does not merit discussion and is overruled.

[10] The lowest outlet works at Ute Reservoir are at an elevation of 3,725 feet. Below that elevation, no water in the reservoir can be released by natural gravity flow. This portion of a reservoir is customarily referred to as "dead storage" because its principal purpose is to serve as a depository for water-borne sediment entering the reservoir. The capacity of the dead storage pool at Ute Reservoir is approximately 20,700 acre-feet, almost half of which is actually occupied by sediment. Since 1962, the New Mexico Interstate Stream Commission, a state agency, has had an agreement with the New Mexico Game Commission to maintain the water in Ute Reservoir at a minimum elevation of 3,741.6 feet for recreational purposes. In 1984, New Mexico unilaterally designated this additional water (the water above dead storage, *i. e.*, between elevation 3,725 and 3,741.6, approximately 49,900 acre-feet) a "desilting pool" which, according to New Mexico, is part of the overall "sediment control pool" at Ute Reservoir. Oklahoma and Texas oppose this designation and contend the water in the "desilting pool" must be counted toward the 200,000 acre-feet limitation in Article IV(b).

matter to the Commission. The Master acknowledged that the record developed in this case probably was sufficient to permit him to decide this issue, Report, at 99–100, but he declined to address it until after the States had first made some attempt, via the Canadian River Commission, to negotiate a settlement. We sustain Texas' and Oklahoma's exception to Part VIII of the Master's Report insofar as those States argue that the matter should not be referred to the Commission.

"Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese*, and this Court must pass upon every question essential to such a determination . . . ." *Kentucky* v. *Indiana*, 281 U. S. 163, 176–177 (1930). It is true that the Court has "often expressed [a] preference that, where possible, States settle their controversies by 'mutual accommodation and agreement,'" *Arizona* v. *California*, 373 U. S. 546, 564 (1963) (quoting *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943), and *Nebraska* v. *Wyoming*, 325 U. S. 589, 616 (1945)), but the Court "does have a serious responsibility to adjudicate cases where there are actual, existing controversies" between the States over the waters in interstate streams. 373 U. S., at 564. There is no doubt that such a dispute exists in this case, Oklahoma and Texas have properly invoked this Court's jurisdiction, and there is no claim that the "desilting pool" issue has not been properly presented. Thus, we see no legal basis for the Master refusing to decide the question and instead sending it to the Commission. Thus, we remand the "desilting pool" question to the Master for such further proceedings as may be necessary and a recommendation on the merits.[11]

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[11] Likewise, we decline the Master's invitation to set forth prerequisites and guidelines, beyond those already in existence, for invoking this Court's original jurisdiction.

V

The States' exceptions to the Special Master's Report are overruled except for Oklahoma's and Texas' challenge to the Master's recommendation that the "desilting pool" issue be referred to the Canadian River Commission, which is sustained in part.[12] The case is remanded to the Master for such further proceedings and recommendations as may be necessary.

So ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, concurring in part and dissenting in part.

An interstate compact, though provided for in the Constitution, and ratified by Congress, is nonetheless essentially a contract between the signatory States. The Court's opin-

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[12] The Special Master has submitted a suggested decree to be entered at this time, but we think it best to defer entry of any decree. First, in light of our remand for further proceedings with respect to the desilting pool issue, the decree will have to be revised in any event. Second, New Mexico has excepted to the proposed decree in certain respects, and it is not clear to us that the Master had the substance of these objections before him when he drafted his final Report. His views on those objections would be helpful. Third, paragraph 1 of the proposed decree provides that New Mexico shall have free and unrestricted use of the water of the Canadian River and its tributaries in New Mexico above Conchas Dam, such use to be made above or at Conchas, including diversions for use on the Tucumcari project. Report, at 112. Under this provision, New Mexico would not have unrestricted use of any water diverted at Conchas for downstream use other than at Tucumcari. Earlier in the Report, however, the Special Master states that he has concluded that New Mexico has unrestricted use of waters in the Canadian River basin above Conchas "if such waters are stored, used or diverted for use *at or above Conchas Dam*," *id.*, at 59, including diversions at Conchas Dam for use on the downstream Tucumcari project. This conclusion, as stated, would not necessarily prevent diversions at Conchas for downstream use other than at Tucumcari, so long as such diversions did not involve downstream storage. In any event, we anticipate that the Special Master's subsequent report dealing with the desilting pool will include a revised draft of the proposed decree.

ion overruling New Mexico's objections to the Report of the Special Master varies the terms of a contract to which the States of Oklahoma, New Mexico, and Texas freely agreed. I do not believe it is within the Court's power to do this, and I therefore dissent from Part III of the Court's opinion, which restricts New Mexico's use of waters that spill over Conchas Dam. I concur in Parts I, II, and IV of the Court's opinion.

The Canadian River traverses three States. It originates in the high country of northern New Mexico, flowing southeast from there into the Texas Panhandle. New Mexico has erected two dams on the river, Conchas Dam and Ute Dam, which provide irrigation water for farming and municipal water for the city of Tucumcari, New Mexico. In Texas, the Sanford project diverts water to serve the municipal and industrial requirements of Texas cities throughout the Texas Panhandle region, from Amarillo to Lubbock. The river flows eastward from this project across the Texas Panhandle and into Oklahoma, and thence southeasterly throughout almost the entire State of Oklahoma until it joins the Arkansas River in the Eufala Reservoir a few miles west of Fort Smith, Arkansas.

In 1950, New Mexico, Texas, and Oklahoma convened to draft the Canadian River Compact (Compact), which apportioned the Canadian's waters in a manner that they hoped would serve New Mexico's and Texas' already substantial needs while anticipating the future needs of those States and Oklahoma. Article IV of the Compact, which governs the allocation of water to New Mexico, provides as follows:

> "(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.
>
> "(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in

> the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet." 66 Stat. 75.

I part company with the majority's interpretation of this Article, based on my view that this provision means what it says. By its express terms, Article IV places *no* restrictions on New Mexico's use of waters originating above Conchas Dam. It imposes only two restrictions on its use of the waters originating in the drainage basin of the Canadian River *below* Conchas Dam: First, New Mexico's enjoyment of these lower-basin waters is restricted to waters located in New Mexico; second, New Mexico may allocate no more than 200,000 acre-feet of its total storage capacity for the conservation of these lower basin waters.

The Compact thus distinguishes between water "originating" in the lower basin and water "originating" at or above the upper basin. New Mexico enjoys free and unrestricted use of the latter. The ordinary understanding of what it means for waters to "originate" in a basin is that they "arise" or "com[e] into existence" in that location. See 10 Oxford English Dictionary 935–936 (2d ed. 1989). Thus, according to the plain meaning of Article IV(a), New Mexico may make unrestricted use of the Canadian River waters that arise above Conchas Dam. These waters may be stored, used, or diverted for use without limitation. Unlike the waters that enter the Canadian River below Conchas Dam, these waters may pass into the lower basin without being subject to the 200,000 acre-feet conservation storage restriction of Article IV(b).

Despite the clear import of the Compact's terms, the Court concludes that the Compact cannot mean what it says, and instead fashions a different allocation than that which is literally described. The Court concludes that "the intent of the Compact drafters was to give New Mexico free and unrestricted use of waters originating in the Canadian River drainage basin above Conchas Dam *only if* the waters were

'stored, used or diverted for use *at or above Conchas Dam.*'" *Ante*, at 232 (quoting Report of Special Master 59) (emphasis in original). The emphasized terms do not appear anywhere in the Compact, and reflect not the intent of the parties, but instead the intent that the Court now imputes to them. Although the Compact grants New Mexico use of "all" waters originating above Conchas Dam, the Court reads this to mean "some": specifically excluding water that eventually winds up below Conchas Dam. *Ante*, at 232–233. Accordingly, the Court holds that *any* water found in the river below Conchas, including spills and seepage from above Conchas Dam, is not subject to free and unrestricted use—even though it clearly originated *above* Conchas Dam.

A compact is a contract among its parties. *Texas* v. *New Mexico*, 482 U. S. 124, 128 (1987). Congressional consent elevates an interstate compact into a law of the United States, yet it remains a contract which is subject to normal rules of enforcement and construction. Thus, "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Texas* v. *New Mexico*, 462 U. S. 554, 564 (1983). Accordingly, where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States.

The Court asserts that we may rewrite the express terms of Article IV(a) because of its understanding of the practical consequences of faithfully applying that provision. *Ante*, at 230–232. The Court contends that, if taken at its word, the Compact would permit New Mexico to lay claim to any water originating above Conchas Dam, including tributaries that arise in Colorado. The Court further asserts that a literal interpretation would permit New Mexico to then chase this water down and continue to claim access to it as it passes down through Texas and Oklahoma. Based on its view that the Compact could not have been drafted to produce the implausible consequence that New Mexico could appropriate

Colorado's, Texas', and Oklahoma's waters, the Court abandons the literal text of the Compact and casts off in search of a new interpretation of the word "originating." *Ante*, at 232.

The Court's approach conjures up impractical consequences where none exist. The language of the Compact does not in any way support the notion that Colorado (a State that did not even participate in the Compact) might forfeit its waters to New Mexico. Colorado's rights are not implicated by the Compact at all. Although a small portion of the Canadian River's waters arise in Colorado, only New Mexico, Texas, and Oklahoma participated in the Compact and are parties to it. By its terms, the Compact allocates only those rights over the interstate waters of the Canadian River belonging to those three States. See Art. X. Thus, the Compact could not, and did not purport to, allocate Colorado's portion of the Canadian River. Any dispute between Colorado and the signatory States to this Compact must be resolved outside the terms of the Compact, and there is no reason to construe this Compact as though it purported to deal with Colorado's claims.

Similarly, Article V of the Compact dispels any concern that New Mexico's rights under a literal reading of Article IV(a) extend to waters originating above Conchas Dam that have left the State. That provision gives Texas "free and unrestricted use of all waters of [the] Canadian River in Texas," subject to certain storage limitations. The Compact gives New Mexico no rights to recapture errant water that reaches Texas because that water is then "in" Texas and therefore subject to Texas' rights under the Compact. The majority's failure to reconcile Article V with Article IV violates the ordinary rule of statutory and contract interpretation that all provisions of a Compact must be read together in a meaningful manner. See *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414, 423 (1905).

Had the Compact's drafters intended to limit New Mexico's free and unrestricted use of the Canadian River waters originating above Conchas Dam in the manner announced today, they would certainly have done so more directly. For example, they might have drafted Article IV(a) to provide that "the amount of conservation storage in New Mexico below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet." But they did not. Instead, they specifically agreed that only waters "which *originate* in the drainage basin of [the] Canadian River below Conchas Dam" were to be so restricted. The only reasonable conclusion to draw from this is that they intended the word "originating" to have some content.

The Court's free-form exploration of the practical consequences of the parties' agreement, and its reliance on evidence outside of the Compact to introduce ambiguity into Compact terms, is both contrary to our precedents and unfair to the parties. When parties to a contract have expressed their intent on a matter in unambiguous terms, we should not substitute our will for their purpose. *Texas* v. *New Mexico*, *supra*, at 564. The parties made an agreement, and have acted in reliance upon the terms of that contract and settled principles of contract law. The contract law principles of all three States disallow recourse to evidence outside the record under these circumstances. In those jurisdictions, where the language of an agreement clearly expresses the intent of the parties, courts may not rely on extrinsic evidence to vary its terms. See, *e. g.*, *Mercury Investment Co.* v. *F. W. Woolworth Co.*, 706 P. 2d 523, 529 (Okla. 1985); *Hobbs Trailers* v. *J. T. Arnett Grain Co.*, 560 S. W. 2d 85, 87 (Tex. 1977); *Trujillo* v. *CS Cattle Co.*, 109 N. M. 705, 709–710, 790 P. 2d 502, 506–507 (1990). Even viewed as a federal statute, the Court's treatment of the Compact's plain language is improper. Congress gave its blessing to this Compact and, in doing so, codified the agreement as federal law. As we stated in *Arizona* v. *California*, 373 U. S. 546, 565–566

(1963): "Where Congress has . . . exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."

Even if I agreed with the Court that it is appropriate in this case to look outside the Compact to determine the meaning of Article IV(a), I would not agree with its conclusion that the parties intended to include overflow waters from the upper basin of Conchas Dam within the term "waters which originate in the drainage basin of Canadian River below Conchas Dam." I do not find either piece of evidence relied upon by the Court to be supportive of that position, let alone persuasive.

The Court says that the Compact negotiators did not place any limitation on the amount of storage of waters originating above Conchas Dam because they believed that those waters were already being fully used. Accordingly, the Court reasons, the negotiators assumed that any future development of the river's waters in New Mexico would necessarily occur only below Conchas Dam, and that 200,000 acre-feet of storage rights would be more than sufficient to satisfy those development needs. *Ante*, at 236. The Court concludes that "these circumstances," demonstrate that Texas and Oklahoma could not have intended to permit New Mexico to impound any more than the 200,000 acre-feet of water for conservation storage purposes below Conchas Dam. *Ante*, at 237.

As a preliminary matter, the record simply does not bear out the Court's view. The only evidence that directly addresses the issue establishes that the 200,000 acre-feet limitation was derived solely from New Mexico's perceived requirements for Canadian River waters *originating* in the lower basin. The "Hill memorandum," authored by Raymond Hill, Chairman of the Engineering Advisory Committee, and approved by the Compact Commission at its final meeting on January 31, 1951, stated that the storage limita-

tion was directed only towards impoundment of "the flood flows of Ute Creek and other minor tributaries of Canadian River *entering the stream below Conchas Dam* and above any contemplated storage works on Canadian River in Texas." Plaintiff's Exh. 38, p. 3 (emphasis added). The storage limits thus appear to have been directed at waters entering New Mexico below Conchas Dam but before the river enters Texas. Indeed, a letter from New Mexico's Commissioner, John Bliss, to Senator Anderson of New Mexico, written the day after the Compact was signed, expressly noted that the 200,000 acre-feet limitation did *not* apply to spills. Plaintiff's Exh. 28. By contrast, there is no direct support whatsoever for the Court's statement that the Compact's 200,000 acre-feet limitation on lower basin waters was intended to apply to upper basin waters captured in the lower basin.

Even assuming that the Court's view of the facts is correct, I do not see how these facts support its conclusion. The Court observes that at the time of the Compact, New Mexico had fully developed reliable supplies of water above Conchas Reservoir, and thus there would be no purpose in placing a limitation upon any increase in the amount of storage of *those* waters. The Engineering Advisory Committee determined that "above Conchas, the available water supply has all been put to use—any further development above Conchas would deplete the supply available for Tucumcari Project; thus future developments would emphasize the better utilization of existing supplies." Plaintiff's Exh. 109, p. 1. This assessment, on its face, refers to the usage of normal water flows and not to the specific issue raised in this case, overflows and spills. In asserting that further development of the upper basin would draw on Tucumcari project waters, the engineer advisers did not contemplate spill waters or return flows from Tucumcari. As the Special Master himself concluded: "The *most* that can be said about the Engineer Advisors' treatment of Conchas spills is that they apparently did not

project that they would recur with the frequency and magnitude that they subsequently have." Report of Special Master 67 (emphasis added).

The Court also relies on the fact that a 1960 study by the Bureau of Reclamation included outflows from Conchas Dam in estimating water supply to Sanford Reservoir, Texas. See Plaintiff's Exh. 102, pp. 64, 67, 70–71. This too has no bearing on the intent of the parties to this Compact, or the meaning of Article IV. The Bureau published the final draft of its report nearly a decade after the Compact was signed. The Bureau's report simply acknowledges that in light of the massive spills over Conchas Dam that occurred in 1941 and 1942, it might be reasonable to assume that occasional spills might contribute to the Sanford project's water supply. This conclusion does not favor one view or another about New Mexico's right to capture some of the overflow from Conchas Dam, since it is clear that New Mexico was physically incapable of capturing all of the overflow from the massive floods that have occurred twice this century. The Bureau's estimates merely reflect reality; they do not suggest that the Compact requires waters flowing from Conchas spills to serve the Sanford project alone.

Finally, putting aside the Court's dismissive treatment of the Compact terms and the parties' expectations, today's decision makes little practical sense. The Court's decision will not protect the rights of the downstream States, except to the extent that it will force New Mexico to behave inefficiently in using its water. Oklahoma and Texas do not dispute that New Mexico could, if it desired, enlarge the reservoir behind Conchas Dam to capture all of the Canadian River's waters and dry up the river beds of the downstream States. Tr. of Oral Arg. 29, 33–34; *ante*, at 238. The Court also acknowledges that the Compact gives New Mexico the included right to capture additional waters at or above Conchas and then divert them to downstream locations. See *ante*, at 242, n. 12. The Court's construction, therefore, does

not prevent New Mexico from capturing flood waters and diverting them to projects below Conchas Dam; it merely forces the State to take its rightful waters by means of costly, inefficient, and wasteful engineering.

The Canadian is an unpredictable river: For the first 36 years of the Compact it lay dormant before it boiled over Conchas Dam, spilling several hundred thousand acre-feet of water into the lower basin. The Compact allocated this water. New Mexico was entitled to keep as much as it wished in modest storage facilities to recapture its upper basin waters. All the rest would naturally flow down to Texas and Oklahoma. The Court today rewrites that simple allocation. While rivers such as the Canadian may be unpredictable, interpretation of contracts involving those rivers should not be. The Court frustrates settled expectations by rewriting the Compact to mean something other than what its language says. Accordingly, I dissent from Part III of the Court's decision.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY ET AL. *v.* CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90–906. Argued April 16, 1991—Decided June 17, 1991

An Act of Congress (hereinafter the Transfer Act) authorized the transfer of operating control of Washington National Airport (National) and Dulles International Airport (Dulles) from the federal Department of Transportation to petitioner Metropolitan Washington Airports Authority (MWAA), which was created by a compact between Virginia and the District of Columbia. Both airports are located in the Virginia suburbs of the District. Dulles is larger than National and lies in a rural area miles from the Capitol. National is a much busier airport due to the convenience of its location at the center of the metropolitan area, but its flight paths over densely populated areas have generated concern among residents about safety, noise, and pollution. Because of congressional concern that surrender of federal control of the airports might result in the transfer of a significant amount of traffic from National to Dulles, the Transfer Act authorizes MWAA's Board of Directors to create a Board of Review (Board). The Board is to be composed of nine congressmen who serve on committees having jurisdiction over transportation issues, and who are to act "in their individual capacities." The Board is vested with a variety of powers, including the authority to veto decisions made by MWAA's directors. After the directors adopted bylaws providing for the Board, and Virginia and the District amended their legislation to give MWAA powers to establish the Board, the directors appointed the Board's nine members from lists submitted by Congress. The directors then adopted a master plan providing for extensive new facilities at National, and the Board voted not to disapprove that plan. Subsequently, respondents—individuals living along National flight paths and Citizens for the Abatement of Aircraft Noise, Inc. (CAAN), whose members include persons living along such paths, and whose purposes include the reduction of National operations and associated noise, safety, and air pollution problems—brought this action seeking declaratory and injunctive relief, alleging that the Board's veto power is unconstitutional. Although ruling that respondents had standing to maintain the action, the District Court granted summary judgment for petitioners. The Court of Appeals reversed, holding, *inter alia*, that Congress' delegation of the

veto power to the Board violated the constitutional doctrine of separation of powers.

Held:

1. Respondents have standing. Accepting as true their claims that the master plan will result in increased noise, pollution, and accidents, they have alleged "personal injury" to themselves that is "fairly traceable" to the Board's veto power. See *Allen* v. *Wright*, 468 U. S. 737, 751. This is because knowledge that the plan was subject to that power undoubtedly influenced MWAA's directors when they drew up the plan. Moreover, because invalidation of the veto power will prevent enactment of the plan, the relief respondents have requested is "likely to . . . redres[s]" their alleged injury. *Ibid.* Furthermore, the harm they allege is not confined to the consequences of a possible increase in National activity, since the Board and the master plan injure CAAN by making it more difficult for it to fulfill its goal of reducing that activity. Pp. 264–265.

2. Congress' conditioning of the airports' transfer upon the creation of a Board of Review composed of congressmen and having veto power over the MWAA directors' decisions violates the separation of powers. Pp. 265–277.

(a) Petitioners argue incorrectly that this case does not raise any separation-of-powers issue because the Board is a state creation that neither exercises federal power nor acts as an agent of Congress. An examination of the Board's origin and structure reveals an entity created at the initiative of Congress, the powers of which Congress has mandated in detail, the purpose of which is to protect an acknowledged federal interest in the efficient operation of airports vital to the smooth conduct of Government and congressional business, and membership in which is controlled by Congress and restricted to Members charged with authority over air transportation. Such an entity necessarily exercises sufficient federal powers as an agent of Congress to mandate separation-of-powers scrutiny. Any other conclusion would permit Congress to evade the Constitution's "carefully crafted" constraints, *INS* v. *Chadha*, 462 U. S. 919, 959, simply by delegating primary responsibility for execution of national policy to the States, subject to the veto power of Members of Congress acting "in their individual capacities." Cf. *Bowsher* v. *Synar*, 478 U. S. 714, 755 (STEVENS, J., concurring in judgment). Nor is there merit to petitioners' contention that the Board should nevertheless be immune from scrutiny for constitutional defects because it was created in the course of Congress' exercise of its power to dispose of federal property under Article IV, § 3, cl. 2. *South Dakota* v. *Dole*, 483 U. S. 203, 212, distinguished. Pp. 265–271.

(b) Congress has not followed a constitutionally acceptable procedure in delegating decisionmaking authority to the Board. To forestall the danger of encroachment into the executive sphere, the Constitution imposes two basic and related constraints on Congress. It may not invest itself, its Members, or its agents with executive power. See, *e. g.*, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 406; *Bowsher*, *supra*, at 726. And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered procedures" specified in Article I. *Chadha*, *supra*, at 951. If the Board's power is considered to be executive, the Constitution does not permit an agent of Congress to exercise it. However, if the power is considered to be legislative, Congress must, but has not, exercised it in conformity with the bicameralism and presentment requirements of Article I, § 7. Although Congress imposed its will on MWAA by means that are unique and that might prove to be innocuous, the statutory scheme by which it did so provides a blueprint for extensive expansion of the legislative power beyond its constitutionally defined role. Pp. 271–277.

286 U. S. App. D. C. 334, 917 F. 2d 48, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and MARSHALL, J., joined, *post*, p. 277.

Deputy Solicitor General Shapiro argued the cause for the United States as respondent under this Court's Rule 12.4. With him on the briefs were *Acting Solicitor General Bryson*, *Assistant Attorney General Gerson*, *Clifford M. Sloan*, and *Douglas Letter*.

William T. Coleman, Jr., argued the cause for petitioners. With him on the briefs were *Donald T. Bliss* and *Debra A. Valentine*.

Patti A. Goldman argued the cause and filed a brief for respondents Citizens for Abatement of Aircraft Noise, Inc., et al.*

**Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *K. Marshall Cook*, Deputy Attorney General, *John M. McCarthy*, Senior Assistant Attorney General, and *William W. Muse* and *John Westrick*, Assistant Attorneys General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging reversal.

JUSTICE STEVENS delivered the opinion of the Court.

An Act of Congress authorizing the transfer of operating control of two major airports from the Federal Government to the Metropolitan Washington Airports Authority (MWAA) conditioned the transfer on the creation by MWAA of a unique "Board of Review" composed of nine Members of Congress and vested with veto power over decisions made by MWAA's Board of Directors.[1] The principal question presented is whether this unusual statutory condition violates the constitutional principle of separation of powers, as interpreted in *INS* v. *Chadha*, 462 U. S. 919 (1983), *Bowsher* v. *Synar*, 478 U. S. 714 (1986), and *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928). We conclude, as did the Court of Appeals for the District of Columbia Circuit, that the condition is unconstitutional.

I

In 1940, Congress authorized the Executive Branch to acquire a tract of land a few miles from the Capitol and to construct what is now Washington National Airport (National). 54 Stat. 686. From the time it opened until 1987, National was owned and operated by the Federal Government. The airport was first managed by the Civil Aeronautics Agency, a division of the Commerce Department. 54 Stat. 688. In 1959, control of National shifted to the newly created Federal Aviation Administration (FAA), an agency that, since 1967, has been a part of the Department of Transportation. See 72 Stat. 731; 80 Stat. 932, 938.

A few years after National opened, the Truman administration proposed that a federal corporation be formed to operate the airport. See Congressional Research Service, Federal Ownership of National and Dulles Airports: Background, Pro-Con Analysis, and Outlook 4 (1985) (CRS Report), reprinted in Hearings before the Subcommittee on

[1] Metropolitan Washington Airports Act of 1986 (Transfer Act), 100 Stat. 3341, 49 U. S. C. App. §§ 2451–2461.

Governmental Efficiency and the District of Columbia of the Senate Committee on Governmental Affairs, 99th Cong., 1st Sess., 404 (1985). The proposal was endorsed by the Hoover Commission in 1949 but never adopted by Congress. Instead, when Congress authorized construction of a second major airport to serve the Washington area, it again provided for federal ownership and operation. 64 Stat. 770. Dulles International Airport (Dulles) was opened in 1962 under the direct control of the FAA. See CRS Report 1–2.

National and Dulles are the only two major commercial airports owned by the Federal Government. A third airport, Baltimore Washington International (BWI), which is owned by the State of Maryland, also serves the Washington metropolitan area. Like Dulles, it is larger than National and located in a rural area many miles from the Capitol. Because of its location, National is by far the busiest and most profitable of the three.[2] Although proposals for the joint operating control of all three airports have been considered, the plan that gave rise to this litigation involves only National and Dulles, both of which are located in Virginia. Maryland's interest in the overall problem explains its representation on the Board of Directors of MWAA. See 49 U. S. C. App. § 2456(e)(3)(C).

Throughout its history, National has been the subject of controversy. Its location at the center of the metropolitan area is a great convenience for air travelers, but flight paths over densely populated areas have generated concern among local residents about safety, noise, and pollution. Those liv-

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[2] "Of the three airports, National, as the Nation's 14th busiest airport (1983), handles by far the most traffic. In 1983, these airports handled passenger volumes of: National, 14.2 million; Dulles, 2.9 million; and BWI, 5.2 million. Other measures of airport activity also indicate a much greater activity level at National. On a combined basis, the [airports] earned the Federal Government a profit of $11.4 million. This profit, however, is entirely the result of activity at National, as Dulles consistently operates at a deficit. BWI, which not long ago operated at a loss, is now a consistent money maker for Maryland." CRS Report 2.

ing closest to the airport have provided the strongest support for proposals to close National or to transfer some of its operations to Dulles. See CRS Report 3.

Despite the FAA's history of profitable operation of National and excellent management of both airports, the Secretary of Transportation concluded that necessary capital improvements could not be financed for either National or Dulles unless control of the airports was transferred to a regional authority with power to raise money by selling tax-exempt bonds.[3] In 1984, she therefore appointed an advisory commission to develop a plan for the creation of such a regional authority. *Id.*, at 6.

The Commission recommended that the proposed authority be created by a congressionally approved compact between Virginia and the District, and that its Board of Directors be composed of 11 members serving staggered 6-year terms, with 5 members to be appointed by the Governor of Virginia, 3 by the Mayor of the District, 2 by the Governor of Maryland, and 1 by the President, with the advice and consent of the Senate. See App. 17. Emphasizing the importance of a "non-political, independent authority," the Commission recommended that members of the board "should not hold elective or appointive political office." *Ibid.* To allay concerns that local interests would not be adequately represented, the Commission recommended a requirement that all

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[3] "There is no question that the daily management of the airports by the Metropolitan Washington Airports unit of FAA has been excellent. However, inclusion of the airports in the unified Federal budget has generally stymied most efforts to improve or expand facilities at either airport to keep pace with the growing commercial and air travel needs of the Washington area. No major capital projects have been financed at either airport from Federal appropriations since the construction of Dulles in the early 1960's. Given the continuing need to limit federal expenditures to reduce Federal deficits, it is unlikely that any significant capital improvements could be undertaken at the airports in the foreseeable future." S. Rep. No. 99–193, p. 2 (1985).

board members except the Presidential appointee reside in the Washington metropolitan area. *Ibid.*

In 1985, Virginia and the District both passed legislation authorizing the establishment of the recommended regional authority. See 1985 Va. Acts, ch. 598; 1985 D. C. Law 6–67. A bill embodying the advisory commission's recommendations passed the Senate. See 132 Cong. Rec. 7263–7281 (1986). In the House of Representatives, however, the legislation encountered strong opposition from Members who expressed concern that the surrender of federal control of the airports might result in the transfer of a significant amount of traffic from National to Dulles. See Hearings on H. R. 2337, H. R. 5040, and S. 1017 before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 99th Cong., 2d Sess., 1–3, 22 (1986).

Substitute bills were therefore drafted to provide for the establishment of a review board with veto power over major actions of MWAA's Board of Directors. Under two of the proposals, the board of review would clearly have acted as an agent of the Congress. After Congress received an opinion from the Department of Justice that a veto of MWAA action by such a board of review "would plainly be legislative action that must conform to the requirements of Article 1, section 7 of the Constitution,"[4] the Senate adopted a version of the re-

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[4] "Two of the suggestions made by the staff would present substantial constitutional problems. The first of these proposals would create a 'Federal Board of Directors,' consisting of three members of the House, appointed by the Speaker, three members of the Senate, appointed by the President pro tempore, and the Comptroller General. As proposed, this Federal Board would clearly be unconstitutional. In reality the Federal Board would be no more than a committee of Congress plus the Comptroller General—who is clearly a legislative officer. This committee would be authorized by the bill to veto certain types of actions otherwise within the Airports Authority's power under applicable state law. In the absence of the Federal Board, the Airports Authority could implement those decisions without further review or approval. Disapproval by the Federal Board of a particular action would thus have 'the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative

view board that required Members of Congress to serve in their individual capacities as representatives of users of the airports. See 132 Cong. Rec. 28372–28375, 28504, 28521–28525 (1986). The provision was further amended in the House, *id.*, at 32127–32144, and the Senate concurred, *id.*, at 32483. Ultimately, § 2456(f) of the Transfer Act, as enacted, defined the composition and powers of the Board of Review in much greater detail than the Board of Directors. Compare 49 U. S. C. App. § 2456(f) with § 2456(e).

Subparagraph (1) of § 2456(f) specifies that the Board of Review "shall consist" of nine Members of the Congress, eight of whom serve on committees with jurisdiction over transportation issues and none of whom may be a Member from Maryland, Virginia, or the District of Columbia.[5] Sub-

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Branch,' *INS* v. *Chadha*, 462 U. S. 919, 952 (1983), and would plainly be legislative action that must conform to the requirements of Article 1, section 7 of the Constitution: passage by both Houses and approval by the President. *Id.* at 954–955. Congress cannot directly vest the Federal Board with authority to veto decisions made by the Airports Authority any more than it can authorize one House, one committee, or one officer to overturn the Attorney General's decision to allow a deportable alien to remain in the United States, to reject rules implemented by an executive agency pursuant to delegated authority, to dictate mandatory budget cuts to be made by the President, or to overturn any decision made by a state agency." App. 26–27 (footnotes omitted).

[5] "The board of directors shall be subject to review of its actions and to requests, in accordance with this subsection, by a Board of Review of the Airports Authority. Such Board of Review shall be established by the board of directors and shall consist of the following, in their individual capacities, as representatives of users of the Metropolitan Washington Airports:

"(A) two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the House of Representatives from a list provided by the Speaker of the House;

"(B) two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the Senate from a list provided by the President pro tempore of the Senate; and

"(C) one member chosen alternatively from members of the House of Representatives and members of the Senate, from a list provided by

paragraph (4)(B) details the actions that must be submitted to the Board of Review for approval, which include adoption of a budget, authorization of bonds, promulgation of regulations, endorsement of a master plan, and appointment of the chief executive officer of the Authority.[6] Subparagraph (4)(D) explains that disapproval by the Board will prevent submitted actions from taking effect.[7] Other significant provisions of the Act include subparagraph (5), which authorizes the Board of Review to require Authority directors to consider any action relating to the airports;[8] subsection (g), which requires that any action changing the hours of operation at either National or Dulles be taken by regulation and therefore be subject to veto by the Board of Review;[9] and

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the Speaker of the House or the President pro tempore of the Senate, respectively.

"The members of the Board of Review shall elect a chairman. A member of the House of Representatives or the Senate from Maryland or Virginia and the Delegate from the District of Columbia may not serve on the Board of Review." 49 U. S. C. App. § 2456(f)(1).

[6] "The following are the actions referred to in subparagraph (A):

"(i) the adoption of an annual budget;

"(ii) the authorization for the issuance of bonds;

"(iii) the adoption, amendment, or repeal of a regulation;

"(iv) the adoption or revision of a master plan, including any proposal for land acquisition; and

"(v) the appointment of the chief executive officer." § 2456(f)(4)(B).

[7] "An action disapproved under this paragraph shall not take effect. Unless an annual budget for a fiscal year has taken effect in accordance with this paragraph, the Airports Authority may not obligate or expend any money in such fiscal year, except for (i) debt service on previously authorized obligations, and (ii) obligations and expenditures for previously authorized capital expenditures and routine operating expenses." § 2456(f)(4)(D).

[8] "The Board of Review may request the Airports Authority to consider and vote, or to report, on any matter related to the Metropolitan Washington Airports. Upon receipt of such a request the Airports Authority shall consider and vote, or report, on the matter as promptly as feasible." § 2456(f)(5).

[9] "Any action of the Airports Authority changing, or having the effect of changing, the hours of operation of or the type of aircraft serving either of

subsection (h), which contains a provision disabling MWAA's Board of Directors from performing any action subject to the veto power if a court should hold that the Board of Review provisions of the Act are invalid.[10]

On March 2, 1987, the Secretary of Transportation and MWAA entered into a long-term lease complying with all of the conditions specified in the then recently enacted Transfer Act. See App. to Pet. for Cert. 163a–187a. The lease provided for a 50-year term and annual rental payments of $3 million "in 1987 dollars." *Id.*, at 170a, 178a. After the lease was executed, MWAA's Board of Directors adopted bylaws providing for the Board of Review, *id.*, at 151a–154a, and Virginia and the District of Columbia amended their legislation to give MWAA power to establish the Board of Review, 1987 Va. Acts, ch. 665; 1987 D. C. Law 7–18. On September 2, 1987, the directors appointed the nine members of the Board of Review from lists that had been submitted by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. App. 57–58.

On March 16, 1988, MWAA's Board of Directors adopted a master plan providing for the construction of a new terminal at National with gates capable of handling larger aircraft, an additional taxiway turnoff to reduce aircraft time on the runway and thereby improve airport capacity, a new dual-level roadway system, and new parking facilities. *Id.*, at 70–71, 89–91. On April 13, the Board of Review met and voted not to disapprove the master plan. *Id.*, at 73–78.

II

In November 1988, Citizens for the Abatement of Aircraft Noise, Inc., and two individuals who reside under flight

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the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority." § 2456(g).

[10] "If the Board of Review established under subsection (f) of this section is unable to carry out its functions under this subchapter by reason of a judicial order, the Airports Authority shall have no authority to perform any of the actions that are required by paragraph (f)(4) of this section to be submitted to the Board of Review." § 2456(h).

paths of aircraft departing from, and arriving at, National (collectively CAAN) brought this action. CAAN sought a declaration that the Board of Review's power to veto actions of MWAA's Board of Directors is unconstitutional and an injunction against any action by the Board of Review as well as any action by the Board of Directors that is subject to Board of Review approval. *Id.*, at 10. The complaint alleged that most of the members of CAAN live under flight paths to and from National and that CAAN's primary purpose is to develop and implement a transportation policy for the Washington area that would include balanced service among its three major airports, thus reducing the operations at National and alleviating noise, safety, and air pollution problems associated with such operations. *Id.*, at 4. The complaint named MWAA and its Board of Review as defendants. *Id.*, at 5.

The District Court granted the defendants' motion for summary judgment. 718 F. Supp. 974 (DC 1989). As a preliminary matter, however, the court held that plaintiffs had standing to maintain the action for two reasons:[11] first, because the master plan will facilitate increased activity at National that is harmful to plaintiffs, and second, because the composition of the Board of Review diminishes the influence of CAAN on airport user issues since local congressmen and senators are ineligible for service on the Board. *Id.*, at 980–982. On the merits, the District Court concluded that there was no violation of the doctrine of separation of powers because the members of the Board of Review acted in their individual capacities as representatives of airport users, and therefore the Board was not an agent of Congress. *Id.*, at 985. Moreover, the Board's powers were derived from the legislation enacted by Virginia and the District, as implemented by MWAA's bylaws, rather than from the Transfer

[11] The District Court also rejected the arguments that the case was not ripe for review and that plaintiffs had failed to exhaust administrative remedies. 718 F. Supp., at 979–980.

Act. *Id.*, at 986. "In short, because Congress exercises no federal power under the Act, it cannot overstep its constitutionally-designated bounds." *Ibid.*

A divided panel of the Court of Appeals for the District of Columbia Circuit reversed. 286 U. S. App. D. C. 334, 917 F. 2d 48 (1990). The court agreed that plaintiffs had standing because they had alleged a distinct and palpable injury that was "fairly traceable" to the implementation of the master plan and a favorable ruling would prevent MWAA from implementing that plan. *Id.*, at 339, 917 F. 2d, at 53. On the merits, the majority concluded that it was "wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny" because it was federal law that had required the establishment of the Board and defined its powers. *Id.*, at 340, 917 F. 2d, at 54. It held that the Board was "in essence a congressional agent" with disapproval powers over key operational decisions that were "quintessentially executive," *id.*, at 343, 917 F. 2d, at 57, and therefore violated the separation of powers, *ibid.* The dissenting judge, emphasizing the importance of construing federal statutes to avoid constitutional questions when fairly possible, concluded that the Board of Review should not be characterized as a federal entity but that, even if it were so characterized, its members could, consistent with the Constitution, serve in their individual capacities even though they were Members of Congress. *Id.*, at 345–347, 917 F. 2d, at 59–61.

Because of the importance of the constitutional question, we granted MWAA's petition for certiorari. 498 U. S. 1045–1046 (1991). Although the United States intervened in the Court of Appeals to support the constitutionality of the Transfer Act, see 28 U. S. C. § 2403(a), the United States did not join in MWAA's petition for certiorari. As a respondent in this Court pursuant to this Court's Rule 12.4, the United

States has again taken the position that the Transfer Act is constitutional.[12]

III

Petitioners (MWAA and the Board of Review) renew the challenge to respondents' standing that was rejected by the District Court and the Court of Appeals. To establish standing, respondents "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). Petitioners argue that respondents' asserted injuries are caused by factors independent of the Board of Review's veto power and that the injuries will not be cured by invalidation of the Board of Review. We believe that petitioners are mistaken.

Respondents alleged that the master plan allows increased air traffic at National and a consequent increase in accident risks, noise, and pollution. App. 10. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint." *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975). If we accept that the master plan's provisions will result in increased noise, pollution, and danger of accidents,

[12] Rule 12.4 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. . . . All parties other than petitioners shall be respondents. . . ." Even though the United States is technically a respondent under Rule 12.4, we shall use the term "respondents" to refer solely to plaintiffs.

The United States does not support the position taken by petitioners and the dissent. The United States argues that "[i]f the exercise of state authority were sufficient in itself to validate a statutorily imposed condition like the one in this case, a massive loophole in the separation of powers would be opened." Brief for United States 31. According to the United States, the condition in this case is constitutional only because "there is here a reasonable basis for the appointment of Members of Congress 'in their individual capacities.'" *Id.*, at 33.

this "personal injury" to respondents is "fairly traceable" to the Board of Review's veto power because knowledge that the master plan was subject to the veto power undoubtedly influenced MWAA's Board of Directors when it drew up the plan. Because invalidation of the veto power will prevent the enactment of the master plan, see 49 U. S. C. App. § 2456(h), the relief respondents have requested is likely to redress their alleged injury. Moreover, the harm respondents have alleged is not confined to the consequences of a possible increase in the level of activity at National. The harm also includes the creation of an impediment to a reduction in that activity. See App. 8. The Board of Review was created by Congress as a mechanism to preserve operations at National at their present level, or at a higher level if possible. See *supra*, at 258. The Board of Review and the master plan, which even petitioners acknowledge is at a minimum "noise neutral," Brief for Petitioners 37–38, therefore injure CAAN by making it more difficult for CAAN to reduce noise and activity at National.[13]

IV

Petitioners argue that this case does not raise any separation-of-powers issue because the Board of Review neither exercises federal power nor acts as an agent of Congress. Examining the origin and structure of the Board, we conclude that petitioners are incorrect.

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[13] In the lower courts, petitioners also challenged this action on ripeness grounds. Although petitioners do not press this issue on appeal, it concerns our jurisdiction under Article III, so we must consider the question on our own initiative. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U. S. 737, 740 (1976). We have no trouble concluding, however, that a challenge to the Board of Review's veto power is ripe even if the veto power has not been exercised to respondents' detriment. The threat of the veto hangs over the Board of Directors like the sword over Damocles, creating a "here-and-now subservience" to the Board of Review sufficient to raise constitutional questions. See *Bowsher* v. *Synar*, 478 U. S. 714, 727, n. 5 (1986).

Petitioners lay great stress on the fact that the Board of Review was established by the bylaws of MWAA, which was created by legislation enacted by the Commonwealth of Virginia and the District of Columbia. Putting aside the unsettled question whether the District of Columbia acts as a State or as an agent of the Federal Government for separation-of-powers purposes, we believe the fact that the Board of Review was created by state enactments is not enough to immunize it from separation-of-powers review. Several factors combine to mandate this result.

Control over National and Dulles was originally in federal hands, and was transferred to MWAA only subject to the condition that the States create the Board of Review. Congress placed such significance on the Board that it required that the Board's invalidation prevent MWAA from taking any action that would have been subject to Board oversight. See 49 U. S. C. App. § 2456(h). Moreover, the Federal Government has a strong and continuing interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business, especially to the work of Congress, whose Members must maintain offices in both Washington and the districts that they represent and must shuttle back and forth according to the dictates of busy and often unpredictable schedules. This federal interest was identified in the preamble to the Transfer Act,[14] justified a Presidential appointee on the Board of Directors, and motivated the creation of the Board of Review, the structure and the powers of which Congress mandated in detail, see § 2456(f). Most sig-

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[14] "The Congress finds that—

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"(3) the Federal Government has a continuing but limited interest in the operation of the two federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government." 49 U. S. C. App. § 2451.

nificant, membership on the Board of Review is limited to federal officials, specifically members of congressional committees charged with authority over air transportation.

That the Members of Congress who serve on the Board nominally serve "in their individual capacities, as representatives of users" of the airports, § 2456(f)(1), does not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes. As we recently held, "separation-of-powers analysis does not turn on the labeling of an activity," *Mistretta* v. *United States*, 488 U. S. 361, 393 (1989). The Transfer Act imposes no requirement that the Members of Congress who are appointed to the Board actually be users of the airports. Rather, the Act imposes the requirement that the Board members have congressional responsibilities related to the federal regulation of air transportation. These facts belie the *ipse dixit* that the Board members will act "in their individual capacities."

Although the legislative history is not necessary to our conclusion that the Board members act in their official congressional capacities, the floor debates in the House confirm our view. See, *e. g.*, 132 Cong. Rec. 32135 (1986) (The bill "also provides for continuing congressional review over the major decisions of the new airport authority. A Congressional Board will still have veto power over the new airport authority's: annual budget; issuance of bonds; regulations; master plan; and the naming of the Chief Executive Officer") (Rep. Lehman); *id.*, at 32136 ("In addition, the motion provides continued congressional control over both airports. Congress would retain oversight through a Board of Review made up of nine Members of Congress. This Board would have the right to overturn major decisions of the airport authority") (Rep. Coughlin); *id.*, at 32137 ("Under this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of author-

ity. . . . We are getting our cake and eating it too. . . . The beauty of the deal is that Congress retains its control without spending a dime") (Rep. Smith); *id.*, at 32141 ("There is, however, a congressional board which is established by this. . . . [T]hat board has been established to make sure that the Nation's interest, the congressional interest was attended to in the consideration of how these two airports are operated") (Rep. Hoyer); *id.*, at 32142 (The bill does "not give up congressional control and oversight—that remains in a Congressional Board of review") (Rep. Conte); *id.*, at 32143 ("I understand that one concern of Members is that by leasing these airports to a local authority, we would be losing control over them. But, in fact, under this bill exactly the opposite is true. We will have more control than before") (Rep. Hammerschmidt).

Congress as a body also exercises substantial power over the appointment and removal of the particular Members of Congress who serve on the Board. The Transfer Act provides that the Board "shall consist" of "two members of the Public Works and Transportation Committee and two members of the Appropriations Committee of the House of Representatives from a list provided by the Speaker of the House," "two members of the Commerce, Science, and Transportation Committee and two members of the Appropriations Committee of the Senate from a list provided by the President pro tempore of the Senate," and "one member chosen alternately . . . from a list provided by the Speaker of the House or the President pro tempore of the Senate, respectively." 49 U. S. C. App. § 2456(f)(1). Significantly, appointments *must* be made from the lists, and there is no requirement that the lists contain more recommendations than the number of Board openings. Cf. 28 U. S. C. § 991(a) (Sentencing Reform Act upheld in *Mistretta* required only that the President "conside[r]" the recommendations of the Judicial Conference); 31 U. S. C. § 703(a) (Congressional

Commission only "recommend[s]" individuals for selection as Comptroller General). The list system, combined with congressional authority over committee assignments, guarantees Congress effective control over appointments. Control over committee assignments also gives Congress effective removal power over Board members because depriving a Board member of membership in the relevant committees deprives the member of authority to sit on the Board. See 49 U. S. C. App. § 2456(f)(1) (Board "shall consist" of relevant committee members).[15]

We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials. Such an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny. Any other conclusion would permit Congress to evade the "carefully crafted" constraints of the Constitution, *INS* v. *Chadha*, 462 U. S. 919, 959 (1983), simply by delegating primary responsibility for execution of national

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[15] Thus, whether or not the statute gives MWAA formal appointment and removal power over the Board of Review is irrelevant. Also irrelevant for separation-of-powers purposes is the likelihood that Congress will discipline Board members by depriving them of committee membership. See *Bowsher*, 478 U. S., at 730 (rejecting relevance of likelihood that Congress would actually remove the Comptroller General). The dissenting judge on the Court of Appeals suggested that a constitutional problem could be avoided by reading the statute's requirement that Board members be members of particular congressional committees as applying only at the time of appointment. See 286 U. S. App. D. C. 334, 347, 917 F. 2d 48, 61 (1990) (Mikva, J., dissenting). We do not dispute that statutes should be interpreted, if possible, to avoid constitutional difficulties. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). However, the statutory language unambiguously requires that the Board of Review "shall consist" of members of certain congressional committees. The Transfer Act cannot fairly be read to impose this requirement only at the time of appointment.

policy to the States, subject to the veto power of Members of Congress acting "in their individual capacities." Cf. *Bowsher* v. *Synar*, 478 U. S., at 755 (STEVENS, J., concurring in judgment).[16]

Petitioners contend that the Board of Review should nevertheless be immune from scrutiny for constitutional defects because it was created in the course of Congress' exercise of its power to dispose of federal property. See U. S. Const., Art. IV, § 3, cl. 2.[17] In *South Dakota* v. *Dole*, 483 U. S. 203 (1987), we held that a grant of highway funds to a State conditioned on the State's prohibition of the possession of alcoholic beverages by persons under the age of 21 was a lawful exercise of Congress' power to spend money for the general welfare. See U. S. Const., Art. I, § 8, cl. 1. Even assuming that "Congress might lack the power to impose a national minimum drinking age directly," we held that this indirect "encouragement to state action" was a valid use of the spending power. *Dole*, 483 U. S., at 212. We thus concluded that Congress could endeavor to accomplish the federal objective of regulating the national drinking age by the indirect use of the spending power even though that regulatory au-

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[16] Petitioners and the United States both place great weight on the fact that the Framers at the Constitutional Convention expressly rejected a constitutional provision that would have prohibited an individual from holding both state and federal office. Brief for Petitioners 15; Brief for United States 21–23. The Framers apparently were concerned that such a prohibition would limit the pool of talented citizens to one level of government or the other. See 1 M. Farrand, Records of the Federal Convention of 1787, pp. 20–21, 217, 386, 389, 428–429 (1911). Neither petitioners nor the United States, however, point to any endorsement by the Framers of offices that are nominally created by the State but for which concurrent federal office is a prerequisite.

[17] U. S. Const., Art. IV, § 3, cl. 2, provides in relevant part:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

thority would otherwise be a matter within state control pursuant to the Twenty-first Amendment.[18]

Our holding in *Dole* did not involve separation-of-powers principles. It concerned only the allocation of power between the Federal Government and the States. Our reasoning that, absent coercion, a sovereign State has both the incentive and the ability to protect its own rights and powers, and therefore may cede such rights and powers, see *id.*, at 210–211, is inapplicable to the issue presented by this case. Here, unlike *Dole*, there is no question about federal power to operate the airports. The question is whether the maintenance of federal control over the airports by means of the Board of Review, which is allegedly a federal instrumentality, is invalid, not because it invades any state power, but because Congress' continued control violates the separation-of-powers principle, the aim of which is to protect not the States but "the whole people from improvident laws." *Chadha*, 462 U. S., at 951. Nothing in our opinion in *Dole* implied that a highway grant to a State could have been conditioned on the State's creating a "Highway Board of Review" composed of Members of Congress. We must therefore consider whether the powers of the Board of Review may, consistent with the separation of powers, be exercised by an agent of Congress.

V

Because National and Dulles are the property of the Federal Government and their operations directly affect inter-

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[18] U. S. Const., Amdt. 21, provides:

"SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

state commerce, there is no doubt concerning the ultimate power of Congress to enact legislation defining the policies that govern those operations. Congress itself can formulate the details, or it can enact general standards and assign to the Executive Branch the responsibility for making necessary managerial decisions in conformance with those standards. The question presented is only whether the Legislature has followed a constitutionally acceptable procedure in delegating decisionmaking authority to the Board of Review.

The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each. The ultimate purpose of this separation of powers is to protect the liberty and security of the governed. As former Attorney General Levi explained:

> "The essence of the separation of powers concept formulated by the Founders from the political experience and philosophy of the revolutionary era is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others is essential to the liberty and security of the people. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes.
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> . . . . .
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> "Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents." Levi, Some Aspects of Separation of Powers, 76 Colum. L. Rev. 385–386 (1976).

Violations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two. Nevertheless, the Court has been sensitive to its responsibility to enforce the principle when necessary.

> "Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. See, *e. g.*, *Bowsher* v. *Synar*, 478 U. S., at 725 (citing *Humphrey's Executor*, 295 U. S., at 629–630). As we stated in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' *Id.*, at 122. We have not hesitated to invalidate provisions of law which violate this principle. See *id.*, at 123." *Morrison* v. *Olson*, 487 U. S. 654, 693 (1988).

The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive. But, as James Madison recognized, the representatives of the majority in a democratic society, if unconstrained, may pose a similar threat:

> "It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.
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> . . . . .
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> "The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. . . . [It] is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.
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> "The legislative department derives a superiority in our governments from other circumstances. Its con-

> stitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere." The Federalist No. 48, pp. 332–334 (J. Cooke ed. 1961).

To forestall the danger of encroachment "beyond the legislative sphere," the Constitution imposes two basic and related constraints on the Congress. It may not "invest itself or its Members with either executive power or judicial power." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 406 (1928). And, when it exercises its legislative power, it must follow the "single, finely wrought and exhaustively considered, procedures" specified in Article I. *INS* v. *Chadha*, 462 U. S., at 951.[19]

The first constraint is illustrated by the Court's holdings in *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), and *Bowsher* v. *Synar*, 478 U. S. 714 (1986). *Springer* involved the validity of Acts of the Philippine Legislature that authorized a committee of three—two legislators and one executive—to vote corporate stock owned by the Philippine Government. Because the Organic Act of the Philippine Islands incorporated the separation-of-powers principle, and because the challenged statute authorized two legislators to perform

[19] "As we emphasized in *Chadha*, when Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I. Neither the unquestioned urgency of the national budget crisis nor the Comptroller General's proud record of professionalism and dedication provides a justification for allowing a congressional agent to set policy that binds the Nation. Rather than turning the task over to its agent, if the Legislative Branch decides to act with conclusive effect, it must do so through a process akin to that specified in the fallback provision—through enactment by both Houses and presentment to the President." *Bowsher*, 478 U. S., at 757–759 (STEVENS, J., concurring in judgment).

the executive function of controlling the management of the government-owned corporations, the Court held the statutes invalid. Our more recent decision in *Bowsher* involved a delegation of authority to the Comptroller General to revise the federal budget. After concluding that the Comptroller General was in effect an agent of Congress, the Court held that he could not exercise executive powers:

> "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher*, 478 U. S., at 726.

The second constraint is illustrated by our decision in *Chadha*. That case involved the validity of a statute that authorized either House of Congress by resolution to invalidate a decision by the Attorney General to allow a deportable alien to remain in the United States. Congress had the power to achieve that result through legislation, but the statute was nevertheless invalid because Congress cannot exercise its legislative power to enact laws without following the bicameral and presentment procedures specified in Article I. For the same reason, an attempt to characterize the budgetary action of the Comptroller General in *Bowsher* as legislative action would not have saved its constitutionality because Congress may not delegate the power to legislate to its own agents or to its own Members.[20]

Respondents rely on both of these constraints in their challenge to the Board of Review. The Court of Appeals found it unnecessary to discuss the second constraint because the

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[20] "If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade 'the carefully crafted restraints spelled out in the Constitution.' [*Chadha*, 462 U. S.,] at 959." *Bowsher*, 478 U. S., at 755 (STEVENS, J., concurring in judgment).

court was satisfied that the power exercised by the Board of Review over "key operational decisions is quintessentially executive." 286 U. S. App. D. C., at 342, 917 F. 2d, at 56. We need not agree or disagree with this characterization by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible. If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7. In short, when Congress "[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," it must take that action by the procedures authorized in the Constitution. See *Chadha*, 462 U. S., at 952–955.[21]

One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a "workable government."[22] Admittedly, Congress imposed its will on the regional authority created by the District of Columbia and the Commonwealth of Virginia by means that are unique

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[21] The Constitution does permit Congress or a part of Congress to take some actions with effects outside the Legislative Branch by means other than the provisions of Art. I, § 7. These include at least the power of the House alone to initiate impeachments, Art. I, § 2, cl. 5; the power of the Senate alone to try impeachments, Art. I, § 3, cl. 6; the power of the Senate alone to approve or disapprove Presidential appointments, Art. II, § 2, cl. 2; and the power of the Senate alone to ratify treaties, Art. II, § 2, cl. 2. See also Art. II, § 1, and Amdt. 12 (congressional role in Presidential election process); Art. V (congressional role in amendment process). Moreover, Congress can, of course, manage its own affairs without complying with the constraints of Art. I, § 7. See *Chadha*, 462 U. S., at 954, n. 16; *Bowsher*, 478 U. S., at 753–756 (STEVENS, J., concurring in judgment).

[22] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring).

and that might prove to be innocuous. However, the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role. Given the scope of the federal power to dispense benefits to the States in a variety of forms and subject to a host of statutory conditions, Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy. As James Madison presciently observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48, at 334. Heeding his warning that legislative "power is of an encroaching nature," we conclude that the Board of Review is an impermissible encroachment.[23]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, dissenting.

Today the Court strikes down yet another innovative and otherwise lawful governmental experiment in the name of separation of powers. To reach this result, the majority must strain to bring state enactments within the ambit of a doctrine hitherto applicable only to the Federal Government and strain again to extend the doctrine even though both Congress and the Executive argue for the constitutionality of

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[23] Because we invalidate the Board of Review under basic separation-of-powers principles, we need not address respondents' claim that Members of Congress serve on the Board in violation of the Incompatibility and Ineligibility Clauses. See U. S. Const., Art. I, § 6. We also express no opinion on whether the appointment process of the Board of Review contravenes the Appointments Clause, U. S. Const., Art. II, § 2, cl. 2.

the arrangement which the Court invalidates. These efforts are untenable because they violate the "'cardinal principle that this Court will first ascertain whether a construction of [a] statute is fairly possible by which the [constitutional] question may be avoided.'" *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring), (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). They are also untenable because the Court's separation-of-powers cases in no way compel the decision the majority reaches.

I

For the first time in its history, the Court employs separation-of-powers doctrine to invalidate a body created under state law. The majority justifies this unprecedented step on the ground that the Board of Review "exercises sufficient federal power . . . to mandate separation-of-powers scrutiny." *Ante*, at 269. This conclusion follows, it is claimed, because the Board, as presently constituted, would not exist but for the conditions set by Congress in the Metropolitan Washington Airports Act of 1986 (Transfer Act), 49 U. S. C. App. § 2456(h)(1). This unprecedented rationale is insufficient on at least two counts. The Court's reasoning fails first because it ignores the plain terms of every instrument relevant to this case. The Court further errs because it also misapprehends the nature of the Transfer Act as a lawful exercise of congressional authority under the Property Clause. U. S. Const., Art. IV, § 3, cl. 2.

A

Both the Airports Authority (Authority) and the Board are clearly creatures of state law. The Authority came into being exclusively by virtue of acts passed by the Commonwealth of Virginia, 1985 Va. Acts, ch. 598, § 2, and the District of Columbia, 1985 D. C. Law 6–67, § 3.[1] These en-

[1] The District of Columbia, of course, is not a State under the Constitution. See, *e. g.*, *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445, 452–453 (1805). Nonetheless, neither respondents nor the Court of Appeals con-

actments expressly declared that the Authority would be a "public body corporate and politic . . . independent of all other bodies" with such powers as "conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District." 1985 Va. Acts, ch. 598, § 2; 1985 D. C. Law 6–67, § 3. The Transfer Act acknowledged that the Authority was to have only "the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia," § 2456(a), and was to be "independent of the . . . Federal Government," 49 U. S. C. App. § 2456(b)(1). Under the Transfer Act, the Secretary of Transportation and the Authority negotiated a lease that defined the powers and composition of the Board to be established. Lease, Art. 13, see App. to Pet. for Cert. 175a–176a. Even then, the Board could not come into existence until the state-created Authority adopted bylaws establishing it. Bylaws, Art. IV, see App. to Pet. for Cert. 151a–154a. To allay any doubt about the Board's provenance, both Virginia and the District amended their enabling legislation to make explicit the Authority's power to establish the Board under state law. See 1987 Va. Acts, ch. 665, § 5.A.5; 1987 D. C. Law 7–18, § 3(c)(2).

The specific features of the Board are consistent with its status as a state-created entity. As the Transfer Act and

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tend that the Authority is a federal entity because its derives its authority from a delegation by the District as well as Virginia. For the purposes of separation-of-powers limitations, the power that the District delegated to the Authority operates as the functional equivalent of state or local power. Cf. *Key* v. *Doyle*, 434 U. S. 59, 68, n. 13 (1977); *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100, 110 (1953). This conclusion follows with additional force since the District currently acts under "home rule" authority. See District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93–198, 87 Stat. 774 (1973). The majority does not suggest that the Authority's partial District of Columbia parentage furnishes a basis for subjecting the Board to separation-of-powers analysis. *Ante*, at 266.

the lease contemplated, the bylaws provide that the Board consist of nine Members of Congress whom the Board of Directors would appoint. 49 U. S. C. App. § 2456(f)(1); Lease, Art. 13A, App. to Pet. for Cert. 175a; Bylaws, Art. IV, § 1, App. to Pet. for Cert. 151a. But, again as contemplated by both the Transfer Act and lease, the bylaws also make clear that the Members of Congress sit not as congressional agents but "in their individual capacities," as "representatives of the users of the Metropolitan Washington Airports." *Ibid.* To ensure that the Board members protect the interests of nationwide users, the bylaws further provide that Members of Congress from Virginia, Maryland, and the District of Columbia would be ineligible. *Id.*, at 152a.

As the Court has emphasized, "[g]oing behind the plain language of a statute in search of a possibly contrary . . . intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 75 (1982) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 26 (1977)). Nowhere should this caution be greater than where the Court flirts with embracing "serious constitutional problems" at the expense of "construe[ing a] statute to avoid such problems." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); see *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.). The majority nonetheless offers three reasons for taking just these steps. First, control over the airports "was originally in federal hands," and was transferred "only subject to the condition that the States create the Board." *Ante*, at 266. Second, "the Federal Government has a strong and continuing interest in the efficient operation of the airports." *Ibid.* Finally, and "[m]ost significant, membership on the Board of Review is limited to federal officials." *Ante*, at 266–267. In other words, Congress, in effect, created a body that, in effect, discharges an ongoing interest of the Federal Govern-

ment through federal officials who, in effect, serve as congressional agents.

This picture stands in stark contrast to that drawn in each of the applicable enactments and agreements which, as noted, establish a state-created authority given the power to create a body to safeguard the interests of nationwide travelers by means of federal officials serving in their individual capacities. We have, to be sure, held that separation-of-powers analysis "does not turn on the labeling of an activity," but instead looks to "practical consequences," *Mistretta* v. *United States*, 488 U. S. 361, 393 (1989). This observation, however, does not give the Court a license to supplant the careful work of the Authority, Virginia, the District, the Federal Executive, and Congress with its own in-house punditry. This is especially so when the instruments under consideration do not merely "label" but detail an arrangement in which any unconstitutional consequences are pure speculation.

As an initial matter, the Board may not have existed but for Congress, but it does not follow that Congress created the Board or even that Congress' role is a "factor" mandating separation-of-powers scrutiny. Congressional suggestion does not render subsequent independent state actions federal ones. Aside from the clear statutory language, the majority's conclusion ignores the entire series of voluntary and intervening actions, agreements, and enactments on the part of the Federal Executive, Virginia, the District, and the Authority, without which the Transfer Act would have been a nullity and the Board of Review would not have existed. Congress commonly enacts conditional transfers of federal resources to the States. See, *e. g.*, *Fullilove* v. *Klutznick*, 448 U. S. 448, (1980); *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937). Separation-of-powers doctrine would know few bounds if such transfers compelled its application to the state enactments that result.

Likewise, nothing charges the Board with oversight of any strong and continuing interest of the Federal Government, much less with conducting such oversight as an agent of Congress. Despite disclaimers, the majority is quick to point to portions of the legislative history in which various Members of Congress state their belief that the Board would ensure congressional control over the airports. *Ante*, at 267–268. But that is not all the legislative history contains. Other statements support the declaration in all the relevant enactments that Members of Congress are to sit on a state-created body in their individual capacities to safeguard the interests of frequent, nationwide users. On this point Members of the House, the Senate, and the Executive agreed. Representative Hammerschmidt, for example, stated that the purpose of a "board of review composed of Congressmen is . . . to protect the interests of all users of the two airports." 132 Cong. Rec. 32143 (1986). Senator Kassebaum contended that Members of Congress could further this purpose since, "[m]ost Members are intensely interested in the amount of service to and from certain cities, from both National and Dulles." *Id.*, at 6069. Secretary of Transportation Dole echoed these sentiments, testifying that "Members of Congress are heavy users of the air transportation system." Hearing on H. R. 2337, H. R. 5040, and S. 1017 before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 99th Cong., 2d Sess., 110 (1986).

Considered as a creature of state law, the Board offends no constitutional provision or doctrine. The Court does not assert that congressional membership on a state-created entity, without more, violates the Incompatibility or Ineligibility Clauses. U. S. Const., Art. I, § 6, cl. 2. By their express terms, these provisions prohibit Members of Congress from serving in another *federal* office. They say nothing to bar congressional service in state or state-created offices. To the contrary, the Framers considered and rejected such a bar. 1 M. Farrand, Records of the Federal Convention of

1787, pp. 20–21, 217, 386, 389, 428–429 (1966 ed.). As Roger Sherman observed, maintaining a state-ineligibility requirement would amount to "erecting a Kingdom at war with itself." *Id.*, at 386. The historical practice of the First Congress confirms the Conventions sentiments, insofar as several Members simultaneously sat as state legislators and judges. See, *e. g.*, Biographical Directory of the United States Congress, 1774–1989, pp. 748, 1389, 1923 (1989). As the Court has held, actions by Members of the First Congress provide weighty evidence on the Constitution's meaning. *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986). Constitutional text and history leave no question but that Virginia and the District of Columbia could constitutionally agree to pass reciprocal legislation creating a body to which nonfederal officers would appoint Members of Congress functioning in their individual capacities. No one in this case contends otherwise.

B

The Court's haste to extend separation-of-powers doctrine is even less defensible in light of the federal statute on which it relies. Far from transforming the Board into a federal entity, the Transfer Act confirms the Board's constitutionality inasmuch as that statute is a legitimate exercise of congressional authority under the Property Clause. U. S. Const., Art. IV, §3, cl. 2. To overlook this fact the Court must once again ignore plain meaning, this time the plain meaning of the Court's controlling precedent regarding Congress' coextensive authority under the Spending Clause. *Ibid.*

As the majority acknowledges, in *South Dakota* v. *Dole*, 483 U. S. 203 (1987), the Court held that Congress could condition a grant of federal funds to a State on the State's raising the drinking age to 21, even assuming that Congress did not have the power to mandate a minimum national drinking age directly. As the majority fails to acknowledge, the Court's holding in no way turned on a State's "incentive and . . . ability to protect its own rights and powers." *Ante*, at

271. Rather, the Court stated that Congress could exercise its spending authority so long as the conditional grant of funds did not violate an "'independent constitutional bar.'" *Dole*, *supra*, at 209 (quoting *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1*, 469 U. S. 256, 269–270 (1985)). *Dole* defined this constraint as follows:

> "[T]he 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. *Instead, we think that the language in our earlier opinions stands for the unexceptional proposition that the* [spending] *power may not be used to induce the States to engage in activities that would themselves be unconstitutional.* Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. . . . Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone." 483 U. S., at 210–211 (emphasis added).

Dole states only that Congress may not induce the States to engage in activities that would themselves have been unconstitutional in the absence of the inducement. The decision does not indicate that Congress can act only when its actions implicate "the allocation of power between the Federal Government and the States" *ante*, at 271, as opposed to principles, "the aim of which is to protect not the States but 'the whole people from improvident laws.'" *Ibid.* Nor could it. In the context of 42 U. S. C. § 1983, the Court has rejected any broad distinction between constitutional provisions that allocate powers and those that affirm rights. *Dennis* v. *Higgins*, 498 U. S. 439, 447–448 (1991). The majority's own application of its test to this case illustrates the difficulties in its position. The Court asserts that *Dole* cannot safeguard

the Board because separation-of-powers doctrine, ultimately, protects the rights of the people. By this logic, *Dole* itself would have had to come out the other way since the Twenty-first Amendment reinstated state authority over liquor, which in turn strengthened federalism, which in turn theoretically protects the rights of the people no less than separation-of-powers principles. See The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison).

There is no question that *Dole*, when faithfully read, places the Board outside the scope of separation-of-powers scrutiny. As noted, no one suggests that Virginia and the District of Columbia could not have created a board of review to which nonfederal officers would appoint Members of Congress had Congress not offered any inducement to do so. The Transfer Act, therefore, did not induce the States to engage in activities that would themselves be unconstitutional. Nor is there any assertion that this case involves the rare circumstance in which "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" *Dole*, *supra*, at 211 (quoting *Steward Machine Co.*, 301 U. S., at 590). In *Dole*, Congress authorized the Secretary of Transportation to withdraw funding should the States fail to comply with certain conditions. Here, Congress merely indicated that federal control over National and Dulles Airports would continue given a failure to comply with certain conditions. Virginia and the District may sorely have wanted control over the airports for themselves. Placing conditions on a desire, however, does not amount to compulsion. *Dole* therefore requires precisely what the majority denies—the rejection of separation-of-powers doctrine as an "independent bar" against Congress conditioning the lease of federal property in this case.[2]

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[2] This is not to say that Congress could condition a grant of property on a state enactment consenting to the exercise of *federal* lawmaking powers that Congress or its individual Members could not exercise consistently with

II

Even assuming that separation-of-powers principles apply, the Court can hold the Board to be unconstitutional only by extending those principles in an unwarranted fashion. The majority contends otherwise, reasoning that the Constitution requires today's result whether the Board exercises executive *or* legislative power. *Ante*, at 274–276. Yet never before has the Court struck down a body on separation-of-powers grounds that neither Congress nor the Executive oppose. It is absurd to suggest that the Board's power represents the type of "legislative usurpatio[n] . . . which, by assembling all power in the same hands . . . must lead to the same tyranny," that concerned the Framers. The Federalist No. 48, *supra*, at 309–310 (J. Madison). More to the point, it is clear that the Board does not offend separation-of-powers principles either under our cases dealing with executive power or our decisions concerning legislative authority.[3]

A

Based on its faulty premise that the Board is exercising federal power, the Court first reasons that "[i]f the [Board's] power is executive, the Constitution does not permit an

Article I. We do not have that situation here, for as explained, the Board does not exercise federal power.

[3] For these reasons, the Court's historical exposition is not entirely relevant. The majority attempts to clear the path for its decision by stressing the Framers' fear of overweaning legislative authority. *Ante*, at 272–274. It cannot be seriously maintained, however, that the basis for fearing legislative encroachment has increased or even persisted rather than substantially diminished. At one point Congress may have reigned as the pre-eminant branch, much as the Framers predicted. See W. Wilson, Congressional Government 40–57 (1885). It does so no longer. This century has witnessed a vast increase in the power that Congress has transferred to the Executive. See *INS* v. *Chadha*, 462 U. S. 919, 968–974 (1983) (WHITE, J., dissenting). Given this shift in the constitutional balance, the Framers' fears of legislative tyranny ring hollow when invoked to portray a body like the Board as a serious encroachment on the powers of the Executive.

agent of Congress to exercise it." *Ante*, at 276. The majority does not, however, rely on the constitutional provisions most directly on point. Under the Incompatibility and Ineligibility Clauses, Members of Congress may not serve in another office that is under the authority of the United States. U. S. Const., Art. I, § 6, cl. 2. If the Board did exercise executive authority that is federal in nature, the Court would have no need to say anything other than that congressional membership on the Board violated these express constitutional limitations. The majority's failure is either unaccountable or suggests that it harbors a certain discomfort with its own position that the Board in fact exercises significant federal power. Whichever is the case, the Court instead relies on expanding nontextual principles as articulated in *Bowsher* v. *Synar*, 478 U. S. 714 (1986). *Bowsher*, echoing *Springer* v. *Philippine Islands*, 277 U. S. 189 (1928), held that the Constitution prevented legislative agents from exercising executive authority. *Bowsher*, *supra*, at 726. The Court asserts that the Board, again in effect, is controlled by Congress. The analysis the Court has hitherto employed to recognize congressional control, however, show this not to be the case.

As *Bowsher* made clear, a "critical factor" in determining whether an official is "subservient to Congress" is the degree to which Congress maintains the power of removal. *Bowsher*, *supra*, at 727. Congress cannot "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of" the removal of a federal executive officer. *Myers* v. *United States*, 272 U. S. 52, 161 (1926). Here Congress exercises no such power. Unlike the statutes struck down in *Bowsher* and *Myers*, the Transfer Act contains no provision authorizing Congress to discharge anyone from the Board. Instead, the only express mention of removal authority over Board members in any enactment occurs in resolutions passed by the Board of Directors under the bylaws. These resolutions provide that members of the

Board shall sit for fixed terms, but may be removed by the Board of Directors for cause. See Resolution No. 87–12 (June 3, 1987), App. 47–48; Resolution No. 87–27 (Sept. 2, 1987), App. 60. This arrangement is consistent with the settled principle that "the power of removal result[s] by a natural implication from the power of appointing." 1 Annals of Cong. 496 (1789) (statement of Rep. Madison). See *Carlucci* v. *Doe*, 488 U. S. 93, 99 (1988); *Myers*, *supra*, at 119.

The majority counters that Congress maintains "effective removal power over Board members because depriving a Board member of membership in [certain congressional] committees deprives the member of authority to sit on the Board." *Ante*, at 269. This conclusion rests on the faulty premise that the Transfer Act requires the removal of a Board member once he or she leaves a particular committee. But the Act does not say this. Rather, it merely states that members of the Board "shall consist" of Members of Congress who sit in certain specified committees. 49 U. S. C. App. § 2456(f)(1). Moreover, the Act elsewhere provides that the standard term of service on the Board is six years. § 2456(f)(2). This term, which spans three Congresses, suggests that a Board member's tenure need not turn on continuing committee or even congressional status. Nor, to date, has any member of the Board been removed for having lost a committee post. Tr. of Oral Arg. 11. Once again, the Court seizes upon a *less* plausible interpretation to reach a constitutional infirmity despite "'[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *DeBartolo Corp.*, 485 U. S., at 575 (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895)); see *Ashwander*, 297 U. S., at 348.

Nor has Congress improperly influenced the appointment process, which is ordinarily a less important factor in separation-of-powers analysis in any event. The Authority's Bylaws, reflecting the lease and the Transfer Act, provide that the Board consist of two members each from the House

Appropriations Committee, the House Public Works Committee, the Senate Appropriations Committee, and the Senate Commerce, Science and Transportation Committee, as well as an additional Member from the House or Senate. Bylaws, Art. IV, § 4, App. to Pet. for Cert. 153a; see Lease, Art. 13A, App. to Pet. for Cert. 175a; 49 U. S. C. App. § 2456(f)(1). The Board of Directors appoints members from lists provided by the Speaker of the House and the President *pro tempore* of the Senate. To the majority, these provisions add up to impermissible congressional control. Our cases point to the opposite conclusion.

Twice in recent Terms the Court has considered similar mechanisms without suggesting that they raised any constitutional concern. In *Bowsher*, the Court voiced no qualms concerning Presidential appointment of the Comptroller General from a list of three individuals suggested by the House Speaker and the President *pro tempore*. 478 U. S., at 727. Likewise, in *Mistretta*, the Court upheld Congress' authority to require the President to appoint three federal judges to the Sentencing Commission after considering a list of six judges recommended by the Judicial Conference of the United States. 488 U. S., at 410, n. 31. The majority attempts to distinguish these cases by asserting that the lists involved were merely recommendations whereas the Board "*must*" be chosen from the submitted lists at issue here. *Ante*, at 268–269. A fair reading of the requirement shows only that the Board may not be chosen outside the lists. It is perfectly plausible to infer that the directors are free to reject any and all candidates on the lists until acceptable names are submitted. It is difficult to see how the marginal difference that would remain between list processes in *Bowsher* and *Mistretta* on one hand, and in this case on the other, would possess any constitutional importance. In sharp contrast, *Springer* can be readily distinguished. In that instance, as in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the Court struck down a scheme in which the Legislature usurped for

itself the appointment authority of a coequal, coordinate branch of Government. *Springer*, 277 U. S., at 203, 205. Here Congress has neither expressly nor substantively vested appointment power in itself or appropriated appointment power properly lodged with the President.

Our recent case law also compels approval of the Board's composition. The majority makes much of the requirement that appointees to the Board must be members of the enumerated congressional committees. *Ante*, at 269. Committee membership, the argument goes, somehow belies the express declaration that Members of Congress are to sit in their individual capacities as representatives of frequent, nationwide travelers. *Mistretta*, however, refused to disqualify federal judges, sitting in their individual capacities, from exercising nonjudicial authority simply because they possessed judicial expertise relevant to their posts on the Sentencing Commission. It is difficult, then, to see why Members of Congress, sitting in their individual capacities, should be disqualified from exercising nonlegislative authority because their legislative expertise—as enhanced by their membership on key transportation and finance committees—is relevant to their posts on the Board. I refuse to invalidate the Board because its members are too well qualified.

B

The majority alternatively suggests that the Board wields an unconstitutional legislative veto contrary to *INS* v. *Chadha*, 462 U. S. 919, 952–955 (1983). If the Board's "power is legislative," the Court opines, "Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Ante*, at 276. The problem with this theory is that if the Board is exercising federal power, its power is not legislative. Neither does the Board itself serve as an agent of Congress in any case.

The majority never makes up its mind whether its claim is that the Board exercises legislative or executive authority.

The Court of Appeals, however, had no doubts, concluding that the Board's authority was "quintessentially executive." 286 U. S. App. D. C. 334, 342, 917 F. 2d 48, 56 (1990). Judge Mikva in dissent operated on the same assumption. See *id.*, at 344–347, 917 F. 2d, at 58–61. Accord, 718 F. Supp. 974, 986 (DC 1989); *Federal Firefighters Association, Local 1* v. *United States*, 723 F. Supp. 825, 826 (DC 1989). If federal authority is being wielded by the Board, the lower courts' characterization is surely correct. Before their transfer to the Authority, National and Dulles were managed by the Federal Aviation Administration, which in turn succeeded the Civil Aeronautics Agency. *Ante*, at 255. There is no question that these two agencies exercised paradigmatic executive power or that the transfer of the airports in no way altered that power, which is now in the hands of the Authority. In *Chadha*, by contrast, there was no question—at least among all but one Member of the Court—that the power over alien deportability was legislative. 462 U. S., at 951–959; *id.*, at 976, 984–989 (WHITE, J., dissenting). But see *id.*, at 959, 964–967 (Powell, J., concurring in judgment). *Chadha* is therefore inapposite. Even more questionable is reliance on *Bowsher* to suggest that requirements of bicameralism and presentment apply to the actions of a "quintessentially executive" entity. While a concurrence in that case explored this theory, 478 U. S., at 755 (STEVENS, J., concurring in judgment), the Court never so held, *id.*, at 732. The Board's authority is not of an order that the Court has ever held to be "an exercise of legislative power . . . subject to the standards prescribed in Art. I." *Chadha, supra*, at 957. The majority can make it so only by reaching past our precedents.

More important, the case for viewing the Board as a "congressional agent" is even less compelling in the context of Article I than it was with reference to Article II. *Chadha* dealt with a self-evident exercise of congressional authority in the form of a resolution passed by either House. 462 U. S., at

925. *Bowsher* involved a situation in which congressional control was at least arguable since the Comptroller General labored under numerous, express statutory obligations to Congress itself. See 478 U. S., at 741–746 (STEVENS, J.). Even then, the Court did not adopt the theory that such control subjected the actions of the Comptroller General to bicameralism and presentment requirements, but instead held that Congress' power of removal amounted to an unconstitutional intrusion on executive authority. *Id.*, at 727–734. Here, by contrast, the Board operates under no obligations to Congress of any sort. To the contrary, every relevant instrument declares that Members of Congress sit in their "individual capacities" as "representatives of the users of the Metropolitan Washington Airports." Bylaws, Art. IV, § 1, App. to Pet. for Cert. 151a; Lease, Art. 13A, App. to Pet. for Cert. 175a; 49 U. S. C. App. § 2456(f)(1). There may well be instances in which a significant congressional presence would mandate an extension of the principles set forth in *Chadha*. This, plainly, is not one.

III

The majority claims not to retreat from our settled rule that "'[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, . . . it should only do so for the most compelling constitutional reasons.'" *Mistretta*, 488 U. S., at 384 (quoting *Bowsher*, *supra*, at 736 (STEVENS, J.)). This rule should apply with even greater force when the arrangement under challenge has also been approved by what are functionally two state legislatures and two state executives.

Since the "compelling constitutional reasons" on which we have relied in our past separation-of-powers decisions are insufficient to strike down the Board, the Court has had to inflate those reasons needlessly to defend today's decision. I cannot follow along this course. The Board violates none of the principles set forth in our cases. Still less does it provide

a "blueprint for extensive expansion of the legislative power beyond its constitutionally confined role." *Ante*, at 277. This view utterly ignores the Executive's ability to protect itself through, among other things, the ample power of the veto. Should Congress ever undertake such improbable projects as transferring national parklands to the States on the condition that its agents control their oversight, see Brief for Respondents 39, there is little doubt that the President would be equal to the task of safeguarding his or her interests. Least of all, finally, can it be said that the Board reflects "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments," that the Framers feared. The Federalist No. 73, at 442 (A. Hamilton). Accordingly, I dissent.

WILSON *v.* SEITER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-7376. Argued January 7, 1991—Decided June 17, 1991

Petitioner Wilson, an Ohio prison inmate, filed suit under 42 U. S. C. § 1983 against respondents, state prison officials, alleging that certain conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. His affidavits described the challenged conditions and charged that the authorities, after notification, had failed to take remedial action. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed on the ground, *inter alia*, that the affidavits failed to establish the requisite culpable state of mind on the part of respondents.

Held:

1. A prisoner claiming that the conditions of his confinement violate the Eighth Amendment must show a culpable state of mind on the part of prison officials. See, *e. g.*, *Whitley* v. *Albers*, 475 U. S. 312, 319. *Rhodes* v. *Chapman*, 452 U. S. 337, distinguished. An intent requirement is implicit in that Amendment's ban on cruel and unusual *punishment*. Wilson's suggested distinction between "short-term" or "one-time" prison conditions (in which a state-of-mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant) is rejected. Pp. 296–302.

2. The "deliberate indifference" standard applied in *Estelle* v. *Gamble*, 429 U. S. 97, 106, to claims involving medical care applies generally to prisoner challenges to conditions of confinement. There is no merit to respondents' contention that that standard should be applied only in cases involving personal, physical injury, and that a malice standard is appropriate in cases challenging conditions. As *Whitley* teaches, the "wantonness" of conduct depends not on its effect on the prisoner, but on the constraints facing the official. Pp. 302–304.

3. The Court of Appeals erred in failing to consider Wilson's claims under the "deliberate indifference" standard and applying instead a standard of "behavior marked by persistent malicious cruelty." It is possible that the error was harmless, since the court said that Wilson's affidavits established "[a]t best . . . negligence." Conceivably, however, the court would have reached a different disposition under the cor-

rect standard, and so the case is remanded for reconsideration on that basis. Pp. 304–306.

893 F. 2d 861, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 306.

Elizabeth Alexander argued the cause for petitioner. With her on the briefs were *Alvin J. Bronstein*, *Gordon J. Beggs*, *John A. Powell*, and *Steven A. Shapiro*.

Deputy Solicitor General Bryson argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dunne*, *Deputy Solicitor General Shapiro*, *Deputy Assistant Attorney General Clegg*, *Michael R. Dreeben*, *David K. Flynn*, and *Thomas E. Chandler*.

Rita S. Eppler, Assistant Attorney General of Ohio, argued the cause for respondents. With her on the brief were *Anthony J. Celebrezze, Jr.*, Attorney General, *Nancy J. Miller*, and *Cherry Lynne Poteet* and *Nancy Johnston*, Assistant Attorneys General.*

**John Boston* filed a brief for the American Public Health Association as *amicus curiae* urging reversal.

A brief of *amici curiae* was filed for the State of Michigan et al. by *Frank J. Kelley*, Attorney General of Michigan, *Gay Secor Hardy*, Solicitor General, and *Thomas C. Nelson*, Assistant Attorney General, joined by the Attorneys General for their respective jurisdictions as follows: *Douglas B. Bailey* of Alaska, *Ron Fields* of Arkansas, *John K. Van de Kamp* of California, *Clarine Nardi Riddle* of Connecticut, *Charles M. Oberly III* of Delaware, *Warren Price III* of Hawaii, *James T. Jones* of Idaho, *Neil F. Hartigan* of Illinois, *Robert T. Stephen* of Kansas, *Frederic J. Cowan* of Kentucky, *William L. Webster* of Missouri, *Robert J. Del Tufo* of New Jersey, *Dave Frohnmayer* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, *Mary Sue Terry* of Virginia, and *Hector Rivera-Cruz* of Puerto Rico.

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the questions whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required.

Petitioner Pearly L. Wilson is a felon incarcerated at the Hocking Correctional Facility (HCF) in Nelsonville, Ohio. Alleging that a number of the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, he brought this action under 42 U. S. C. § 1983 against respondents Richard P. Seiter, then Director of the Ohio Department of Rehabilitation and Correction, and Carl Humphreys, then warden of HCF. The complaint alleged overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates. Petitioner sought declaratory and injunctive relief, as well as $900,000 in compensatory and punitive damages. App. 2–9, 53–54, 62–63.

The parties filed cross-motions for summary judgment with supporting affidavits. Petitioner's affidavits described the challenged conditions and charged that the authorities, after notification, had failed to take remedial action. Respondents' affidavits denied that some of the alleged conditions existed, and described efforts by prison officials to improve the others.

The District Court granted summary judgment for respondents. The Court of Appeals for the Sixth Circuit affirmed, 893 F. 2d 861 (1990), and we granted certiorari, 498 U. S. 808 (1990).

I

The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amend-

ment, *Robinson* v. *California*, 370 U. S. 660, 666 (1962), prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes. In *Estelle* v. *Gamble*, 429 U. S. 97 (1976), we first acknowledged that the provision could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment. We rejected, however, the inmate's claim in that case that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind. Since, we said, only the "'unnecessary *and wanton* infliction of pain'" implicates the Eighth Amendment, *id.*, at 104 (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion) (emphasis added)), a prisoner advancing such a claim must, at a minimum, allege "deliberate indifference" to his "serious" medical needs. 429 U. S., at 106. "It is *only* such indifference" that can violate the Eighth Amendment, *ibid.* (emphasis added); allegations of "inadvertent failure to provide adequate medical care," *id.*, at 105, or of a "negligent . . . diagnos[is]," *id.*, at 106, simply fail to establish the requisite culpable state of mind.

Estelle relied in large measure on an earlier case, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), which involved not a prison deprivation but an effort to subject a prisoner to a second electrocution after the first attempt failed by reason of a malfunction in the electric chair. There Justice Reed, writing for a plurality of the Court, emphasized that the Eighth Amendment prohibited "the *wanton* infliction of pain," *id.*, at 463 (emphasis added). Because the first attempt had been thwarted by an "unforeseeable accident," the officials lacked the culpable state of mind necessary for the punishment to be regarded as "cruel," regardless of the actual suffering inflicted. "The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell

block." *Id.*, at 464. Justice Frankfurter, concurring solely on the basis of the Due Process Clause of the Fourteenth Amendment, emphasized that the first attempt had failed because of "an innocent misadventure," *id.*, at 470, and suggested that he might reach a different conclusion in "a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt," *id.*, at 471.

After *Estelle*, we next confronted an Eighth Amendment challenge to a prison deprivation in *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). In that case, inmates at the Southern Ohio Correctional Facility contended that the lodging of two inmates in a single cell ("double celling") constituted cruel and unusual punishment. We rejected that contention, concluding that it amounts "[a]t most . . . to a theory that double celling inflicts pain," *id.*, at 348–349, but not that it constitutes the "unnecessary and wanton infliction of pain" that violates the Eighth Amendment, *id.*, at 346. The Constitution, we said, "does not mandate comfortable prisons," *id.*, at 349, and only those deprivations denying "the minimal civilized measure of life's necessities," *id.*, at 347, are sufficiently grave to form the basis of an Eighth Amendment violation.

Our holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?), and we did not consider the subjective component (Did the officials act with a sufficiently culpable state of mind?). That *Rhodes* had not eliminated the subjective component was made clear by our next relevant case, *Whitley* v. *Albers*, 475 U. S. 312 (1986). There an inmate shot by a guard during an attempt to quell a prison disturbance contended that he had been subjected to cruel and unusual punishment. We stated:

> "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not

> purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is *obduracy and wantonness, not inadvertence or error in good faith*, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.*, at 319 (emphasis added; citations omitted; internal quotation marks omitted).

These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.[1] See also *Graham* v. *Connor*, 490 U. S. 386, 398 (1989). Petitioner concedes that this is so with respect to *some* claims of cruel and unusual prison condi-

[1] The concurrence would distinguish these cases on the ground that they did not involve "conditions of confinement" but rather "specific acts or omissions directed at individual prisoners." *Post*, at 309. It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not—much less that the one constitutes "punishment" and the other does not. The concurrence's imaginative interpretation of *Estelle* v. *Gamble*, 429 U. S. 97 (1976), has not been imagined by the Courts of Appeals—or as far as we are aware even litigants before the Courts of Appeals—which have routinely applied the "deliberate indifference" requirement to claims of prison-wide deprivation of medical treatment. See, *e. g.*, *Toussaint* v. *McCarthy*, 801 F. 2d 1080, 1111–1113 (CA9 1986); *French* v. *Owens*, 777 F. 2d 1250, 1254–1255 (CA7 1985).

Of course the concurrence does not say that the deprivation must be imposed upon *all* prisoners to rise to the level of a "condition of confinement" and of "punishment"—only that it does not suffice if directed at "individual prisoners." One wonders whether depriving all the individual prisoners who are murderers would suffice; or all the individual prisoners in Cellblock B. The concurrence's distinction seems to us not only unsupportable in principle but unworkable in practice.

tions. He acknowledges, for instance, that if a prison boiler malfunctions accidentally during a cold winter, an inmate would have no basis for an Eighth Amendment claim, even if he suffers objectively significant harm. Reply Brief for Petitioner 12–14. Petitioner, and the United States as *amicus curiae* in support of petitioner, suggests that we should draw a distinction between "short-term" or "one-time" conditions (in which a state-of-mind requirement would apply) and "continuing" or "systemic" conditions (where official state of mind would be irrelevant). We perceive neither a logical nor a practical basis for that distinction. The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify. As Judge Posner has observed:

> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985." *Duckworth* v. *Franzen*, 780 F. 2d 645, 652 (CA7 1985), cert. denied, 479 U. S. 816 (1986).

See also *Johnson* v. *Glick*, 481 F. 2d 1028, 1032 (CA2) (Friendly, J.), ("The thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose"), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). Cf. *Block* v. *Rutherford*, 468 U. S. 576, 584 (1984); *Bell* v. *Wolfish*, 441 U. S. 520, 537–539 (1979). The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent, cf. *Canton* v. *Harris*, 489 U. S. 378, 390, n. 10 (1989); but there is no logical reason

why it should cause the *requirement* of intent to evaporate. The proposed short-term/long-term distinction also defies rational implementation. Apart from the difficulty of determining the day or hour that divides the two categories (Is it the same for *all* conditions?), the violations alleged in specific cases often consist of composite conditions that do not lend themselves to such pigeonholing. Cf. *McCarthy* v. *Bronson*, 500 U. S. 136, 143–144 (1991).[2]

The United States suggests that a state-of-mind inquiry might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions. Even if that were so, it is hard to understand how it could control the meaning of "cruel and unusual punishments" in the Eighth Amendment. An intent requirement is either implicit in the word "punishment" or is not; it cannot be alter-

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[2]The concurrence, going beyond what both petitioner and the United States have argued here, takes the position that *all* conditions that exist in prison, even though prison officials neither know nor have reason to know about them, constitute "punishment." For the reasons we have described, there is no basis for that position in principle, and it is contradicted by our cases. The concurrence purports to find support for it in two cases, *Hutto* v. *Finney*, 437 U. S. 678 (1978), and *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). In *Hutto*, as the concurrence's description makes clear, the question whether the conditions remedied by the District Court's order constituted cruel and unusual punishment was not at issue. Indeed, apart from attorney's fees, the only element of the order at issue in *any* respect pertained to "punitive isolation," *post*, at 307. Even if one were to think that we passed upon the "cruel and unusual punishment" point uninvited and *sub silentio*, punitive isolation is self-evidently inflicted with punitive intent. As for *Rhodes*, the concurrence describes that as addressing "for the first time a *disputed* contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment." *Post*, at 307 (emphasis in original). What it does not mention is that the only element disputed (as well as the only element decided, see *supra*, at 298) was whether the conditions were a sufficiently serious deprivation to violate the constitutional standard. When that is borne in mind, it is evident that the lengthy quotation from that case set forth in the concurrence, *post*, at 307–309, provides no support, even by way of dictum, for the concurrence's position.

nately required and ignored as policy considerations might dictate. At any rate, the validity of a "cost" defense as negating the requisite intent is not at issue in this case, since respondents have never advanced it. Nor, we might note, is there any indication that other officials have sought to use such a defense to avoid the holding of *Estelle* v. *Gamble*, 429 U. S. 97 (1976).

II

Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind, it remains for us to consider what state of mind applies in cases challenging prison conditions. As described above, our cases say that the offending conduct must be *wanton*. *Whitley* makes clear, however, that in this context wantonness does not have a fixed meaning but must be determined with "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U. S., at 320. Where (as in *Whitley*) officials act in response to a prison disturbance, their actions are necessarily taken "in haste, under pressure," and balanced against "competing institutional concerns for the safety of prison staff or other inmates." *Ibid.* In such an emergency situation, we found that wantonness consisted of acting "'maliciously and sadistically for the very purpose of causing harm.'" *Id.*, at 320–321 (quoting *Johnson*, 481 F. 2d, at 1033). See also *Dudley* v. *Stubbs*, 489 U. S. 1034, 1037–1038 (1989) (O'CONNOR, J., dissenting from denial of certiorari). In contrast, "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities," *Whitley*, *supra*, at 320, so that in that context, as *Estelle* held, "deliberate indifference" would constitute wantonness.

The parties agree (and the lower courts have consistently held, see, *e. g.*, *LaFaut* v. *Smith*, 834 F. 2d 389, 391–392 (CA4 1987)), that the very high state of mind prescribed by

Whitley does not apply to prison conditions cases. Petitioner argues that, to the extent officials' state of mind is relevant at all, there is no justification for a standard more demanding than *Estelle*'s "deliberate indifference." Respondents counter that "deliberate indifference" is appropriate only in "cases involving personal injury of a physical nature," and that a malice standard should be applied in cases such as this, which "do not involve . . . detriment to bodily integrity, pain, injury, or loss of life." Brief for Respondents 28–29.

We do not agree with respondents' suggestion that the "wantonness" of conduct depends upon its effect upon the prisoner. *Whitley* teaches that, assuming the conduct is harmful enough to satisfy the objective component of an Eighth Amendment claim, see *Rhodes* v. *Chapman*, 452 U. S. 337 (1981), whether it can be characterized as "wanton" depends upon the constraints facing the *official*. From that standpoint, we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions. Thus, as retired Justice Powell has concluded: "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*." *LaFaut*, 834 F. 2d, at 391–392. See also *Lopez* v. *Robinson*, 914 F. 2d 486, 492 (CA4 1990); *Givens* v. *Jones*, 900 F. 2d 1229, 1234 (CA8 1990); *Cortes-Quinones* v. *Jimenez-Nettleship*, 842 F. 2d 556,

558 (CA1), cert. denied, 488 U. S. 823 (1988); *Morgan* v. *District of Columbia*, 263 U. S. App. D. C. 69, 77–78, 824 F. 2d 1049, 1057–1058 (1987).

III

We now consider whether, in light of the foregoing analysis, the Sixth Circuit erred in affirming the District Court's grant of summary judgment in respondents' favor.

As a preliminary matter, we must address petitioner's contention that the Court of Appeals erred in dismissing, before it reached the state-of-mind issue, a number of claims (inadequate cooling, housing with mentally ill inmates, and overcrowding) on the ground that, even if proved, they did not involve the serious deprivation required by *Rhodes*. A court cannot dismiss any challenged condition, petitioner contends, as long as other conditions remain in dispute, for each condition must be "considered as part of the overall conditions challenged," Brief for Petitioner 36. Petitioner bases this contention upon our observation in *Rhodes* that conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. 452 U. S., at 347.

As other courts besides the Court of Appeals here have understood, see *Wellman* v. *Faulkner*, 715 F. 2d 269, 275 (CA7 1983), cert. denied, 468 U. S. 1217 (1984); *Hoptowit* v. *Ray*, 682 F. 2d 1237, 1247 (CA9 1982); *Wright* v. *Rushen*, 642 F. 2d 1129, 1133 (CA9 1981), our statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts. *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets. Compare *Spain* v. *Procunier*, 600 F. 2d 189, 199 (CA9 1979) (outdoor exercise required when prisoners otherwise confined in small cells almost 24 hours

per day), with *Clay* v. *Miller*, 626 F. 2d 345, 347 (CA4 1980) (outdoor exercise not required when prisoners otherwise had access to dayroom 18 hours per day). To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists. While we express no opinion on the relative gravity of the various claims that the Sixth Circuit found to pass and fail the threshold test of serious deprivation, we reject the contention made here that no claim can be found to fail that test in isolation.

After disposing of the three claims on the basis of *Rhodes*, the Court of Appeals proceeded to uphold the District Court's dismissal of petitioner's remaining claims on the ground that his affidavits failed to establish the requisite culpable state of mind. The critical portion of its opinion reads as follows:

> "[T]he *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim." 893 F. 2d, at 867.

It appears from this, and from the consistent reference to "the *Whitley* standard" elsewhere in the opinion, that the court believed that the criterion of liability was whether respondents acted "maliciously and sadistically for the very purpose of causing harm," *Whitley*, 475 U. S., at 320–321. To be sure, mere negligence would satisfy neither that nor the more lenient "deliberate indifference" standard, so that any error on the point may have been harmless. Conceivably, however, the court would have given further thought to

its finding of "[a]t best . . . negligence" if it realized that that was not merely an argument *a fortiori*, but a determination almost essential to the judgment. Out of an abundance of caution, we vacate the judgment of the Sixth Circuit and remand the case for reconsideration under the appropriate standard.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

The majority holds that prisoners challenging the conditions of their confinement under the Eighth Amendment must show "deliberate indifference" by the responsible officials. Because that requirement is inconsistent with our prior decisions, I concur only in the judgment.

It is well established, and the majority does not dispute, that pain or other suffering that is part of the punishment imposed on convicted criminals is subject to Eighth Amendment scrutiny without regard to an intent requirement. The linchpin of the majority's analysis therefore is its assertion that "[i]f the pain inflicted is not formally meted out *as punishment by the statute or the sentencing judge*, some mental element must be attributed to the inflicting officer before it can qualify." *Ante*, at 300 (emphasis added). That reasoning disregards our prior decisions that have involved challenges to conditions of confinement, where we have made it clear that the conditions are themselves *part of the punishment*, even though not specifically "meted out" by a statute or judge.

We first considered the relationship between the Eighth Amendment and conditions of confinement in *Hutto* v. *Finney*, 437 U. S. 678 (1978). There, the District Court had entered a series of remedial orders after determining that the conditions in the Arkansas prison system violated the Eighth Amendment. The prison officials, while conceding that the conditions were cruel and unusual, challenged two aspects of

the District Court's relief: (1) an order limiting punitive isolation to 30 days; and (2) an award of attorney's fees.

In upholding the District Court's limitation on punitive isolation, we first made it clear that the conditions of confinement are part of the punishment that is subject to Eighth Amendment scrutiny:

> "The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, 'proscribe[s] more than physically barbarous punishments.' *Estelle* v. *Gamble*, 429 U. S. 97, 102 [(1976)]. It prohibits penalties that are grossly disproportionate to the offense, *Weems* v. *United States*, 217 U. S. 349, 367 [(1910)], as well as those that transgress today's '"broad and idealistic concepts of dignity, civilized standards, humanity, and decency."' *Estelle* v. *Gamble*, *supra*, at 102, quoting *Jackson* v. *Bishop*, 404 F. 2d 571, 579 (CA8 1968). *Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.*" *Id.*, at 685 (emphasis added).

Focusing only on the objective conditions of confinement, we then explained that we found "no error in the [District Court's] conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment." *Id.*, at 687.

In *Rhodes* v. *Chapman*, 452 U. S. 337 (1981), we addressed for the first time a *disputed* contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment. See *id.*, at 344–345. There, prisoners challenged the "double celling" of inmates at an Ohio prison. In addressing that claim, we began by reiterating the various bases for an Eighth Amendment challenge:

> "Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' *Gregg* v.

Georgia, [428 U. S. 153,] 173 [(1976)], or are grossly disproportionate to the severity of the crime, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Weems* v. *United States*, 217 U. S. 349 (1910). Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' *Gregg* v. *Georgia*, *supra*, at 183; *Estelle* v. *Gamble*, 429 U. S. 97, 103 (1976).

"No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion)." *Id.*, at 346 (footnote omitted).

We then explained how those principles operate in the context of a challenge to conditions of confinement:

"*These principles apply when the conditions of confinement compose the punishment at issue.* Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In *Estelle* v. *Gamble*, *supra*, we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U. S., at 103. In *Hutto* v. *Finney*, *supra*, the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recog-

nized in *Gamble*, *supra*, at 103–104." *Id.*, at 347 (emphasis added).

Finally, we applied those principles to the conditions at issue and found that "there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." *Id.*, at 348. *Rhodes* makes it crystal clear, therefore, that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is "formally meted out *as punishment* by the statute or the sentencing judge," *ante*, at 300—we examine only the objective severity, not the subjective intent of government officials.

The majority relies upon our decisions in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947); *Estelle* v. *Gamble*, 429 U. S. 97 (1976); and *Whitley* v. *Albers*, 475 U. S. 312 (1986), but none of those cases involved a challenge to conditions of confinement. Instead, they involved challenges to specific acts or omissions directed at individual prisoners. In *Gamble*, for example, the challenge was not to a general lack of access to medical care at the prison, but to the allegedly inadequate delivery of that treatment to the plaintiff. Similarly, in *Whitley* the challenge was to the action of a prison guard in shooting the plaintiff during a riot, not to any condition in the prison. The distinction is crucial because "unlike 'conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie* v. *Crawford*, 833 F. 2d 47, 50 (CA5 1987) *(per curiam)*, reinstated in part en banc, 858 F. 2d 1101, 1103 (CA5 1988).

Moreover, *Whitley* expressly supports an objective standard for challenges to conditions of confinement. There, in discussing the Eighth Amendment, we stated:

"An express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) ('de-

liberate indifference' to a prisoner's serious medical needs is cruel and unusual punishment), and *harsh 'conditions of confinement' may constitute cruel and unusual punishment* unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.' *Rhodes* v. *Chapman*, 452 U. S. 337, 347 (1981)." 475 U. S., at 319 (emphasis added).

The majority places great weight on the subsequent dictum in *Whitley* that "'[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.'" *Ibid.* See *ante*, at 298–299. The word "conduct" in that statement, however, is referring to "conduct that does not purport to be punishment at all," 475 U. S., at 319, rather than to the "harsh 'conditions of confinement'" referred to earlier in the opinion.

Not only is the majority's intent requirement a departure from precedent, it likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.[1]

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[1] It is telling that the lower courts often have examined only the objective conditions, and not the subjective intent of government officials, when considering Eighth Amendment challenges to conditions of confinement. See, *e. g.*, *Tillery* v. *Owens*, 907 F. 2d 418, 426–428 (CA3 1990); *Foulds* v. *Corley*, 833 F. 2d 52, 54–55 (CA5 1987); *French* v. *Owens*, 777 F. 2d 1250, 1252–1254 (CA7 1985), cert. denied, 479 U. S. 817 (1986); *Hoptowit* v. *Spellman*, 753 F. 2d 779, 784 (CA9 1985).

The majority's approach also is unwise. It leaves open the possibility, for example, that prison officials will be able to defeat a § 1983 action challenging inhumane prison conditions simply by showing that the conditions are caused by insufficient funding from the state legislature rather than by any deliberate indifference on the part of the prison officials. See *ante*, at 301–302.[2] In my view, having chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney* v. *Winnebago Cty. Dept. of Social Services*, 489 U. S. 189, 198–200 (1989). As the United States argues: "[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." Brief for United States as *Amicus Curiae* 19. The ultimate result of today's decision, I fear, is that "serious deprivations of basic human needs," *Rhodes*, 452 U. S., at 347, will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."

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[2] Among the lower courts, "[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith* v. *Sullivan*, 611 F. 2d 1039, 1043–1044 (CA5 1980). See also, *e. g.*, *Wellman* v. *Faulkner*, 715 F. 2d 269, 274 (CA7 1983), cert. denied, 468 U. S. 1217 (1984); *Ramos* v. *Lamm*, 639 F. 2d 559, 573, n. 19 (CA10 1980), cert. denied, 450 U. S. 1041 (1981); *Battle* v. *Anderson*, 564 F. 2d 388, 396 (CA10 1977); *Gates* v. *Collier*, 501 F. 2d 1291, 1319 (CA5 1974).

RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL. *v.* GEARY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–769. Argued April 23, 1991—Decided June 17, 1991

Article II, § 6(b), of the California Constitution prohibits political parties and party central committees from endorsing, supporting, or opposing candidates for nonpartisan offices such as county and city offices. Based on § 6(b), it is the policy of petitioners—the City and County of San Francisco, its board of supervisors, and certain local officials—to delete any reference to party endorsements from candidates' statements included in the voter pamphlets that petitioners print and distribute. Respondents—among whom are 10 registered voters in the city and county, including members of the local Republican and Democratic Central Committees—filed suit seeking, *inter alia*, a declaration that § 6(b) violates the First and Fourteenth Amendments and an injunction preventing petitioners from editing candidate statements to delete references to party endorsements. The District Court entered summary judgment for respondents, declaring § 6(b) unconstitutional and enjoining its enforcement, and the Court of Appeals affirmed.

Held: The question whether § 6(b) violates the First Amendment is not justiciable in this case, since respondents have not demonstrated a live controversy ripe for resolution by the federal courts. Pp. 316–324.

(a) Although respondents have standing to claim that § 6(b) has been applied in an unconstitutional manner to bar their own speech, the allegations in their complaint and affidavits raise serious questions about their standing to assert other claims. In their capacity as voters, they only allege injury flowing from § 6(b)'s application to prevent speech by candidates in the voter pamphlets. There is reason to doubt that that injury can be redressed by a declaration of § 6(b)'s invalidity or an injunction against its enforcement, since a separate California statute, the constitutionality of which was not litigated in this case, might well be construed to prevent candidates from mentioning party endorsements in voter pamphlets, even in the absence of § 6(b). Moreover, apart from the possibility of an overbreadth claim, discussed *infra*, paragraph (c), the standing of respondent committee members to litigate based on injuries to their respective committees' rights is unsettled. See *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 543–545. Nor is it clear, putting aside redressability concerns, that the committee

members have third-party standing to assert the rights of candidates, since no obvious barrier exists preventing candidates from asserting their own rights. See *Powers* v. *Ohio*, 499 U. S. 400, 414–415. Pp. 318–320.

(b) Respondents' allegations fail to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech. Their generalized claim that petitioners deleted party endorsements from candidate statements in past elections does not do so, since, so far as can be discerned from the record, those disputes had become moot by the time respondents filed suit. Similarly, an allegation that the Democratic committee has not endorsed candidates "[i]n elections since 1986" for fear of the consequences of violating § 6(b) will not support a federal-court action absent a contention that § 6(b) prevented a particular endorsement, and that the controversy had not become moot prior to the litigation. Nor can a ripe controversy be found in the fact that the Republican committee endorsed candidates for nonpartisan elections in 1987, the year this suit was filed, since nothing in the record suggests that petitioners took any action to enforce § 6(b) as a result of those endorsements, or that there was any desire or attempt to include the endorsements in the candidates' statements. Allegations that respondents desire to endorse candidates in future elections also present no ripe controversy, absent a factual record of an actual or imminent application of § 6(b) sufficient to present the constitutional issues in clean-cut and concrete form. Indeed, the record contains no evidence of a credible threat that § 6(b) will be enforced, other than against candidates in the context of voter pamphlets. In these circumstances, postponing adjudication until a more concrete controversy arises will not impose a substantial hardship on respondents and will permit the state courts further opportunity to construe § 6(b), perhaps in the process materially altering the questions to be decided. Pp. 320–323.

(c) Even if respondents' complaint may be read to assert a facial overbreadth challenge, the better course might have been to address in the first instance the constitutionality of § 6(b) as applied in the context of voter pamphlets. See, *e. g.*, *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469, 484–485. If the as-applied challenge had been resolved first, the justiciability problems determining the disposition of this case might well have concluded the litigation at an earlier stage. Pp. 323–324.

911 F. 2d 280, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SOUTER, JJ., joined, and in all but Part II–B of which SCALIA, J., joined. STEVENS, J., filed a concurring

opinion, *post*, p. 325. WHITE, J., filed a dissenting opinion, *post*, p. 327. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 334.

Dennis Aftergut argued the cause for petitioners. With him on the briefs were *Louise H. Renne, pro se*, and *Thomas J. Owen*.

Arlo Hale Smith argued the cause and filed a brief for respondents.

Cedric C. Chao argued the cause for the California Democratic Party et al. as *amici curiae* urging affirmance.*

JUSTICE KENNEDY delivered the opinion of the Court.†

Petitioners seek review of a decision of the United States Court of Appeals for the Ninth Circuit holding that Article II, § 6(b), of the California Constitution violates the First and Fourteenth Amendments to the Constitution of the United States. Section 6(b) reads: "No political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." Its companion provision, § 6(a), provides that "[a]ll judicial, school, county, and city offices shall be nonpartisan."

I

In view of our determination that the case is nonjusticiable, the identity of the parties has crucial relevance. Petitioners are the City and County of San Francisco, its board of supervisors, and certain local officials. The individual respondents are 10 registered voters residing in the City and County of San Francisco. They include the chairman and three members of the San Francisco Republican County Central Committee and one member of the San Francisco Democratic County Central Committee. Election Action, an asso-

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**Jerome B. Falk, Jr.*, and *Steven L. Mayer* filed a brief for the California Judges Association as *amicus curiae* urging reversal.

Karl Olson, Steven R. Shapiro, and *Alan L. Schlosser* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

†JUSTICE SCALIA joins all but Part II–B of this opinion.

ciation of voters, is also a respondent, but it asserts no interest in relation to the issues before us different from that of the individual voters. Hence, we need not consider it further.

Respondents filed this suit in the United States District Court for the Northern District of California. Their third cause of action challenged § 6(b) and petitioners' acknowledged policy, based on that provision, of deleting any references to a party endorsement from the candidate statements included in voter pamphlets. As we understand it, petitioners print the pamphlets and pay the postage required to mail them to voters. The voter pamphlets contain statements prepared by candidates for office and arguments submitted by interested persons concerning other measures on the ballot. The complaint sought a declaration that Article II, § 6, is unconstitutional and an injunction preventing petitioners from editing candidate statements to delete references to party endorsements.

The District Court granted summary judgment for respondents on their third cause of action, declaring § 6(b) unconstitutional and enjoining petitioners from enforcing it. 708 F. Supp. 278 (1988). The court entered judgment on this claim pursuant to Federal Rule of Civil Procedure 54(b), and petitioners appealed. A Ninth Circuit panel reversed, 880 F. 2d 1062 (1989), but the en banc Court of Appeals affirmed the District Court's decision, 911 F. 2d 280 (1990).

We granted certiorari, 498 U. S. 1046 (1991), to determine whether § 6(b) violates the First Amendment. At oral argument, doubts arose concerning the justiciability of that issue in the case before us. Having examined the complaint and the record, we hold that respondents have not demonstrated a live controversy ripe for resolution by the federal courts. As a consequence of our finding of nonjusticiability, we vacate the Ninth Circuit's judgment and remand with instructions to dismiss respondents' third cause of action.

II

Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. We presume that federal courts lack jurisdiction "unless 'the contrary appears affirmatively from the record.'" *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 546 (1986), quoting *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). "'It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Bender*, *supra*, at 546, n. 8, quoting *Warth* v. *Seldin*, 422 U. S. 490, 517–518 (1975).

A

Proper resolution of the justiciability issues presented here requires examination of the pleadings and record to determine the nature of the dispute and the interests of the parties in having it resolved in this judicial proceeding. According to the complaint, the respondent committee members "desire to endorse, support, and oppose candidates for city and county office through their county central committees, and to publicize such endorsements by having said endorsements printed in candidate's statements published in the voter's pamphlet." App. 4, ¶36. All respondents "desire to read endorsements of candidates for city and county office as part of candidate's statements printed in the San Francisco voter's pamphlet." *Id.*, at 5, ¶37.

The complaint alleges that in the past certain of these petitioners "have deleted all references in candidate's statements for City and County offices to endorsements by political party central committees or officers or members of such committees," and that they will continue such deletions in the future unless restrained by court order. ¶38. Respondents believe an actual controversy exists because they contend §6 and any other law relied upon to refuse to print the endorsements are unconstitutional in that they "abridge [respond-

ents'] rights to free speech and association," while petitioners dispute these contentions. ¶39. The third cause of action concludes with general assertions that respondents have been harmed by the past and threatened deletion of endorsements from candidate statements, and that because of those deletions they have suffered and will suffer irreparable injury to their rights of free speech and association. *Id.*, at 5–6, ¶¶40–41.

An affidavit submitted by the chairman of the Republican committee in connection with respondents' motion for summary judgment illuminates and supplements the allegations of the complaint. It indicates the committee has a policy of endorsing candidates for nonpartisan offices:

> "In 1987, the Republican Committee endorsed Arlo Smith for District Attorney, Michael Hennessey for Sheriff, and John Molinari for Mayor, despite objections from some that such endorsements are prohibited by California Constitution Article [II], Section 6. It is the plan and intention of the Republican Committee to endorse candidates for nonpartisan offices in as many future elections as possible. The Republican Committee would like to have such endorsements publicized by endorsed candidates in their candidate's statements in the San Francisco voter's pamphlet, and to encourage endorsed candidates to so publish their endorsements by the Republican Committee.
>
> "In the future, I and other Republican Committee members . . . would like to use our titles as Republican County Committeemen in endorsements we make of local candidates which are printed in the San Francisco voter's pamphlet. We cannot presently do so as [petitioner] Jay Patterson has a policy of deleting the word 'Republican' from all such endorsements." *Id.*, at 15–16.

An affidavit submitted by a Democratic committeeman states that "[i]n elections since 1986, the Democratic commit-

tee has declined to endorse candidates for nonpartisan office solely out of concern that committee members may be criminally or civilly prosecuted for violation of the endorsement ban contained in" § 6. *Id.*, at 12. It also provides two examples of elections in which the word "Democratic" had been deleted from candidate statements. One involved an endorsement by a committee member of one of these respondents, then a candidate for local office, and in another the respondent committee member wished to mention that position in his own candidate statement. *Ibid.* Those elections occurred prior to the adoption of § 6(b), but at least one and perhaps both were held at a time when a California appellate court had found a ban on party endorsements implicit in the state constitutional provision designating which offices are nonpartisan, now § 6(a). See *Unger* v. *Superior Court of Marin County*, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980), overruled by *Unger* v. *Superior Court of City and County of San Francisco*, 37 Cal. 3d 612, 692 P. 2d 238 (1984).

B

Respondents' allegations indicate that, relevant to this suit, petitioners interpret § 6(b) to apply to three different categories of speakers. First, as suggested by the language of the provision, it applies to party central committees. Second, petitioners' reliance on § 6(b) to edit candidate statements demonstrates that they believe the provision applies as well to the speech of candidates for nonpartisan office, at least in the forum provided by the voter pamphlets. Third, petitioners have interpreted § 6(b) to apply to members and officers of party central committees, as shown by their policy of deleting references to endorsements by these individuals from candidate statements. The first of these interpretations flows from the plain language of § 6(b), while the second and third require inferences from the text.

As an initial matter, serious questions arise concerning the standing of respondents to defend the rights of speak-

ers in any of these categories except to the extent that certain respondents in the third category may assert their own rights. In their capacity as voters, respondents only allege injury flowing from application of § 6(b) to prevent speech by candidates in the voter pamphlets. We have at times permitted First Amendment claims by those who did not themselves intend to engage in speech, but instead wanted to challenge a restriction on speech they desired to hear. See, *e. g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). There is reason to doubt, however, that the injury alleged by these voters can be redressed by a declaration of § 6(b)'s invalidity or an injunction against its enforcement. See *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 615–616 (1989) (opinion of KENNEDY, J., joined by REHNQUIST, C. J., and STEVENS and SCALIA, JJ.) (party seeking to invoke authority of federal courts must show injury "likely to be redressed by the requested relief"); *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("relief from the injury must be 'likely' to follow from a favorable decision"); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 38 (1976). A separate California statute, the constitutionality of which was not litigated in this case, provides that a candidate's statement "shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations." Cal. Elec. Code Ann. § 10012 (West 1977 and Supp. 1991). This statute might be construed to prevent candidates from mentioning party endorsements in voter pamphlets, even in the absence of § 6(b). Overlapping enactments can be designed to further differing state interests, and invalidation of one may not impugn the validity of another.

The respondent committee members allege injury to their rights, either through their committees or as individual committee members, to endorse candidates for nonpartisan offices, and also allege injury from the inability of candidates to include those endorsements in voter pamphlets. Respond-

ents of course have standing to claim that § 6(b) has been applied in an unconstitutional manner to bar their own speech. Apart, though, from the possibility of an overbreadth challenge, an alternative we discuss below, the standing of the committee members to litigate based on injuries to the rights of their respective committees is unsettled. See *Bender* v. *Williamsport Area School Dist.*, 475 U. S., at 543–545 (school board member, as member of a "collegial body," could not take appeal board as a whole declined to take). It may be that rights the committee members can exercise only in conjunction with the other members of the committee must be defended by the committee itself. Nor is it clear, putting aside our concerns about redressability, that the committee members have third-party standing to assert the rights of candidates, since no obvious barrier exists that would prevent a candidate from asserting his or her own rights. See *Powers* v. *Ohio*, 499 U. S. 400, 414–415 (1991).

C

Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention. See *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 136–148 (1974). Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech. Respondents' generalized claim that petitioners have deleted party endorsements from candidate statements in past elections does not demonstrate a live controversy. So far as we can discern from the record, those disputes had become moot by the time respondents filed suit. While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context, see *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969), that doctrine will not revive a dispute which became moot before the action commenced. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive re-

lief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea* v. *Littleton*, 414 U. S. 488, 495–496 (1974); see *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983).

The allegation that the Democratic committee has not endorsed candidates "[i]n elections since 1986" for fear of the consequences of violating § 6, App. 12, provides insufficient indication of a controversy continuing at the time this litigation began or arising thereafter. The affidavit provides no indication whom the Democratic committee wished to endorse, for which office, or in what election. Absent a contention that § 6(b) prevented a particular endorsement, and that the controversy had not become moot prior to the litigation, this allegation will not support an action in federal court.

Nor can a ripe controversy be found in the fact that the Republican committee endorsed candidates for nonpartisan elections in 1987, the year this suit was filed. Whether or not all of those endorsements involved elections pending at the time this action commenced, a point on which the affidavit is not clear, we have no reason to believe that § 6(b) had any impact on the conduct of those involved. The committee made these endorsements "despite objections from some that such endorsements are prohibited" by the provision at issue. App. 15. Nothing in the record suggests that any action was taken to enforce § 6(b) as a result of those endorsements. We know of no adverse consequences suffered by the Republican committee or its members due to the apparent violation of § 6(b). We also have no indication that any of the three endorsed candidates desired or attempted to include the party's endorsement in a candidate statement.

We also discern no ripe controversy in the allegations that respondents desire to endorse candidates in future elections, either as individual committee members or through their committees. Respondents do not allege an intention to endorse any particular candidate, nor that a candidate wants to include a party's or committee member's endorsement in a candidate statement. We possess no factual record of an ac-

tual or imminent application of § 6(b) sufficient to present the constitutional issues in "clean-cut and concrete form." *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 584 (1947); see *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583 (1972); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U. S. 111 (1962) *(per curiam); Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945). We do not know the nature of the endorsement, how it would be publicized, or the precise language petitioners might delete from the voter pamphlet. To the extent respondents allege that a committee or a committee member wishes to "support" or "oppose" a candidate other than through endorsements, they do not specify what form that support or opposition would take.

The record also contains no evidence of a credible threat that § 6(b) will be enforced, other than against candidates in the context of voter pamphlets. The only instances disclosed by the record in which parties endorsed specific candidates did not, so far as we can tell, result in petitioners taking any enforcement action. While the record indicates that the Democratic committee feared prosecution of its members if it endorsed a candidate, we find no explanation of what criminal provision that conduct might be held to violate. Petitioners' counsel indicated at oral argument that § 6(b) carries no criminal penalties, and may only be enforced by injunction. Nothing in the record suggests that petitioners have threatened to seek an injunction against county committees or their members if they violate § 6(b).

While petitioners have threatened not to allow candidates to include endorsements by county committees or their members in the voter pamphlets prepared by the government, we do not believe deferring adjudication will impose a substantial hardship on these respondents. In all probability, respondents can learn which candidates have been endorsed by particular parties or committee members through other means. If respondents or their committees do desire to make a particular endorsement in the future, and a candidate wishes to

include the endorsement in a voter pamphlet, the constitutionality of petitioners' refusal to publish the endorsement can be litigated in the context of a concrete dispute.

Postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe § 6(b), and perhaps in the process to "materially alter the question to be decided." *Babbitt* v. *Farm Workers*, 442 U. S. 289, 306 (1979); see also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 506 (1989) (plurality opinion). It is not clear from the language of the provision, for instance, that it applies to individual members of county committees. This apparent construction of the provision by petitioners, which may give respondents standing in this case, could be held invalid by the state courts. State courts also may provide further definition to § 6(b)'s operative language, "endorse, support, or oppose." "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Longshoremen* v. *Boyd*, 347 U. S. 222, 224 (1954).

D

We conclude with a word about the propriety of resolving the facial constitutionality of § 6(b) without first addressing its application to a particular set of facts. In some First Amendment contexts, we have permitted litigants injured by a particular application of a statute to assert a facial overbreadth challenge, one seeking invalidation of the statute because its application in other situations would be unconstitutional. See *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). We have some doubt that respondents' complaint should be construed to assert a facial challenge to § 6(b). Beyond question, the gravamen of the complaint is petitioners' application of § 6(b) to delete party endorsements from candidate statements in voter pamphlets. While the complaint seeks a dec-

laration of § 6(b)'s unconstitutionality, the only injunctive relief it requests relates to the editing of candidate statements. References to other applications of § 6(b) are at best conclusory.

But even if one may read the complaint to assert a facial challenge, the better course might have been to address in the first instance the constitutionality of § 6(b) as applied in the context of voter pamphlets. "It is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989); see also *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503–504 (1985). If the as-applied challenge had been resolved first in this case, the problems of justiciability that determine our disposition might well have concluded the litigation at an earlier stage.

III

The free speech issues argued in the briefs filed here have fundamental and far-reaching import. For that very reason, we cannot decide the case based upon the amorphous and ill-defined factual record presented to us. Rules of justiciability serve to make the judicial process a principled one. Were we to depart from those rules, our disposition of the case would lack the clarity and force which ought to inform the exercise of judicial authority.

The judgment is vacated, and the case is remanded with instructions to dismiss respondents' third cause of action without prejudice.

It is so ordered.

JUSTICE STEVENS, concurring.

The dissenting opinions in this case illustrate why the Court should decline review of the merits of the case in its present posture. JUSTICE MARSHALL concludes that Article II, § 6(b), of the California Constitution is invalid on its face because it is overbroad. JUSTICE WHITE, on the other hand, concludes that respondents' complaint may not be construed as including a facial overbreadth challenge, and that § 6(b) is valid insofar as it is applied to petitioners' policy of refusing to include endorsements in candidates' campaign mailings.

Given the very real possibility that the outcome of this litigation depends entirely on whether the complaint should be construed as making a facial challenge or an as-applied challenge—for it is apparent that JUSTICE WHITE and JUSTICE MARSHALL may both be interpreting the merits of their respective First Amendment questions correctly—and given the difficulty of determining whether respondents' complaint against petitioners' policy of deleting party endorsements from candidates' statements may fairly be construed as including a facial overbreadth challenge, the Court is surely wise in refusing to address the merits on the present record.

Two other prudential concerns weigh against deciding the merits of this case. First, I am not sure that respondents' challenge to petitioners' policy of deleting party endorsements is ripe for review. If such a challenge had been brought by a political party or a party central committee, and if the complaint had alleged that these organizations wanted to endorse, support, or oppose a candidate for nonpartisan office but were inhibited from doing so because of the constitutional provision, the case would unquestionably be ripe. Cf. *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214 (1989). Because I do not believe an individual member of a party or committee may sue on behalf of such an organization, see *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 544 (1986), however, no such plaintiff presenting a ripe controversy is before us. Alternatively, if this ac-

tion had been brought by a candidate who had been endorsed by a political party and who sought to include that endorsement in his or her candidate's statement, we would also be confronted with a ripe controversy.

Unlike such scenarios, however, the respondents in this case are voters. They claim, based on petitioners' representations, that § 6(b) of the State Constitution forms the basis for petitioners' policy of deleting party endorsements from candidates' mailed statements. But there are at least two hurdles that these respondents must overcome before their claim would be ripe for judicial review. First, they must prove that political parties would endorse certain candidates if § 6(b) were repealed or invalidated. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756, and n. 14 (1976) (allowing listeners of potential speech to bring an anticipatory challenge where the parties stipulate that "a speaker exists"). Arguably, respondents have met this hurdle by offering several affidavits of members of party central committees stating that the committees plan to endorse candidates for nonpartisan office and to seek to have those endorsements publicized. See, *e. g.*, App. 15. Second, respondents must prove that specific candidates for nonpartisan office would seek to mention the party endorsements in their statements if petitioners' policy of deleting such endorsements were declared invalid (moreover, to prove injury to *their* interest as informed voters, respondents would perhaps also have to allege that they would not otherwise know about the endorsements if the endorsements are not included in mailed candidates' statements). This latter hurdle has not, in my opinion, been met by respondents in such a way as to ensure that we are confronted by a definite and ripe controversy.

Moreover, I am troubled by the redressability issues inherent in this case. Respondents' complaint has challenged § 6(b) of the State Constitution, but it has not challenged the validity of § 10012 of the California Elections Code. That sec-

tion plainly prohibits the inclusion of the party affiliation of candidates in nonpartisan elections, and unquestionably would provide an adequate basis for petitioners' challenged policy even if the constitutional prohibition against endorsements were invalidated. Even if we were to strike down § 6(b) as overbroad, then, it is unclear whether respondents' alleged injury would be redressed.

These three unsettled issues—involving whether a facial overbreadth challenge may be construed to have been made, whether respondents' challenge is ripe, and whether their injury is redressable—coalesce to convince me that review of the merits of respondents' challenge is best left for another day and another complaint. No substantial hardship would accrue from a dismissal of respondents' action without prejudice, and the courts would benefit from a more precise articulation of a current and definite controversy. I therefore join the Court's opinion and judgment ordering the lower courts to dismiss the action without prejudice.

JUSTICE WHITE, dissenting.

The majority's concerns about the justiciability of this case, even though ultimately misplaced, are understandable, in light of the failure by the courts below to analyze the precise nature of the constitutional challenge that is presented here. Those concerns, however, should not prevent us from independently examining the record and deciding the issues that are properly presented. In doing so, I conclude that the only constitutional challenge that is properly before us is to the action by the San Francisco Registrar of Voters in deleting references in official voter pamphlets to political party endorsements, a challenge that is fully justiciable. Because the registrar's action does not violate the First Amendment, I would reverse the judgment of the Court of Appeals. I therefore dissent from the majority's disposition of this case.

I

The courts below erred in treating respondents' challenge in this case as a facial challenge to the constitutionality of Article II, § 6(b), of the California Constitution. Respondents' complaint reveals that they challenged only *the application* of § 6(b) by San Francisco's Registrar of Voters in refusing to print in voter pamphlets references to endorsements by political parties.*

After listing the defendants, the complaint sets forth the background for its three causes of action:

> "In connection with each municipal election, the City and County mails a voters pamphlet to all registered voters. Said pamphlet contains ballot arguments for and against City and County measures, and statements of qualifications of candidates for City and County offices. Defendant PATTERSON [the Registrar of Voters] is responsible for preparing and publishing said voters pamphlet." App. 3, ¶ 10.

The first cause of action then challenges the registrar's deletion of portions of proposed ballot arguments submitted for inclusion in the voter pamphlets. 2 Record, Complaint ¶¶ 11–20. The second cause of action challenges the registrar's charge of a fee for ballot arguments. *Id.*, ¶¶ 21–30.

The third cause of action is the one that is at issue in this case. That cause of action, like the two before it, concerns

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*Pursuant to both local and state law, the San Francisco Registrar of Voters prepares, publishes, and distributes to voters an information pamphlet for nonpartisan municipal elections. The pamphlet contains personal statements by candidates for nonpartisan offices, the text of each ballot measure submitted to the voters, digests of the measures, and arguments for and against the measures. See *Geary* v. *Renne*, 914 F. 2d 1249, 1251 (CA9 1990). The pamphlet is subsidized by the city, "with mailing and distribution costs borne by the city and the authors of ballot arguments charged a minimal sum to defray printing costs." *Patterson* v. *Board of Supervisors of City and County of San Francisco*, 202 Cal. App. 3d 22, 30, 248 Cal. Rptr. 253, 259 (1988).

actions by the registrar with regard to the voter pamphlets. Specifically, respondents alleged:

> "In the past, defendants PATTERSON and CITY AND COUNTY OF SAN FRANCISCO have deleted all references in candidate's statements for City and County offices to endorsements by political party central committees or officers or members of such committees. Unless restrained from doing so by order of this court, defendants threaten to continue to delete or exclude all references in candidate's statements to endorsement of candidates by political party central committees, or officers or members of such central committees." App. 5, ¶38.

Respondents also stated that they "desire to read endorsements of candidates for city and county office as part of candidate's statements printed in the San Francisco voters pamphlet." ¶37. Finally, the only injunctive relief sought based on the third cause of action relates to the deletion of endorsements from the voter pamphlets. *Id.*, at 6, ¶6.

In entering summary judgment in favor of respondents on the third cause of action, the District Court described respondents' claim as follows: "Plaintiffs claim—and defendants admit—that defendants refuse to permit political party and political party central committee endorsements of candidates for such offices to be printed in the San Francisco voter's pamphlet on account of said state constitutional provision." 708 F. Supp. 278, 279 (ND Cal. 1988). Similarly, both the original Ninth Circuit panel and the en banc panel stated:

> "The basis of [respondents'] complaint as it relates to this appeal was the refusal of [petitioners], the City and County of San Francisco and the San Francisco Registrar of Voters, to permit official political party and party central committee endorsements of candidates for nonpartisan offices to be printed in the San Francisco Voter Pamphlet in connection with elections scheduled for June

> 2 and November 3, 1987. [Petitioners] based their refusal to print party endorsements on the language of article II, § 6(b)." 880 F. 2d 1062, 1063 (1989); 911 F. 2d 280, 282 (1990).

As the above discussion reveals, and as the majority recognizes, see *ante*, at 323–324, it is far from clear that a facial challenge to the constitutionality of § 6(b) was presented in this case. Both the District Court and the en banc Court of Appeals nevertheless invalidated § 6(b) on its face, without analyzing the nature of respondents' claim. In doing so, they violated two important rules of judicial restraint applicable to the resolution of constitutional issues—"'one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *United States* v. *Raines*, 362 U. S. 17, 21 (1960), quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also 911 F. 2d, at 304–305 (Rymer, J., dissenting) (arguing that § 6(b) should not be invalidated on this record).

II

I have no doubt that the narrow issue presented in this case is justiciable. As the majority recognizes, *ante*, at 319, respondents in their capacity as registered voters are alleging that § 6(b), as applied by the registrar to the voter pamphlets, interferes with their right to receive information concerning party endorsements. Such a claim finds support in our decisions, which have long held that the First Amendment protects the right to receive information and ideas, and that this right is sufficient to confer standing to challenge restrictions on speech. See, *e. g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756–757 (1976); *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972); *Red Lion Broadcasting Co.* v. *FCC*, 395

U. S. 367, 390 (1969); *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969).

The majority nevertheless speculates that there is no standing here because a provision in the California Elections Code "might be construed to prevent candidates from mentioning party endorsements in voter pamphlets, even in the absence of § 6(b)." *Ante*, at 319. That makes no sense. A constitutional challenge to a law is not barred merely because other laws might also mandate the allegedly unconstitutional action. If so, it would mean that the States or the Federal Government could insulate unconstitutional laws from attack simply by making them redundant.

The majority's confusion on this issue is illustrated by its reliance on *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 615–616 (1989). There, the plaintiffs challenged the validity of a state statute governing mineral leases, basing their standing on the claim that the statute deprived school trust funds of millions of dollars and thereby resulted in higher taxes. *Id.*, at 614. Four Members of this Court noted that even if the statute were struck down, it was far from clear that the plaintiffs would enjoy any tax relief: "If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged." *Ibid.*

The difference between *ASARCO* and the present case is obvious. In *ASARCO*, the State could, by other actions, *legally* preclude the relief sought by the plaintiffs. By contrast, in this case if petitioners' refusal to allow references to party endorsements in voter pamphlets is unconstitutional when based on § 6(b), it probably is also unconstitutional if based on some other state law, such as California's Elections Code. The injury alleged by respondents, therefore, "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 38 (1976).

The majority's concerns about the ripeness of respondents' challenge, see *ante*, at 320–323, also are not sufficient to preclude our review. Although I agree with the majority that the possible applications of § 6(b) to speech by political parties and their members is not properly before us, here respondents have alleged, and petitioners have admitted, that San Francisco's Registrar of Voters has deleted references to political party endorsements from candidate statements printed in official voter pamphlets, and that he threatens to continue to do so in the future. See App. 5, ¶ 38; *id.*, at 9, ¶ XIV. Indeed, the majority admits that the record contains "evidence of a credible threat that § 6(b) will be enforced . . . against candidates in the context of voter pamphlets." *Ante*, at 322. The registrar's past conduct makes his threat "sufficiently real and immediate to show an existing controversy." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974). See, *e. g.*, *Blum* v. *Yaretsky*, 457 U. S. 991, 1000–1001 (1982) (allowing nursing home residents to sue to prevent threatened transfers); *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974) (allowing action for declaratory relief based on threats of enforcement of antihandbilling statute). It is well settled that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979), quoting *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923). This is particularly true in the election context, where we often have allowed preenforcement challenges to restrictions on speech. See, *e. g.*, *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214 (1989); *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208 (1986); *Buckley* v. *Valeo*, 424 U. S. 1 (1976).

I therefore dissent from the judgment ordering dismissal for want of justiciability.

III

Although the Court does not discuss the merits, I shall briefly outline my view that the state constitutional provision

at issue in this case is constitutional as applied to the exclusion of party endorsements from the official voter pamphlets. California has decided that its "[j]udicial, school, county, and city offices shall be nonpartisan." Cal. Const., Art. II, § 6(a). I am confident that this provision is valid at least insofar as it authorizes the State not to identify on the official ballot candidates for nonpartisan offices as the candidates of political parties. The interests proffered as supporting California's nonpartisan provision—promotion of the impartial administration of government, prevention of corruption, and the avoidance of the appearance of bias—are interests that we have already held are sufficiently important to justify restrictions on partisan political activities. See *Civil Service Commission* v. *Letter Carriers*, 413 U. S. 548, 565 (1973). These interests are also similar to the interests supporting limitations on ballot access and voting eligibility that have been upheld by this Court. See *American Party of Texas* v. *White*, 415 U. S. 767, 786 (1974); *Storer* v. *Brown*, 415 U. S. 724, 736 (1974); *Rosario* v. *Rockefeller*, 410 U. S. 752, 761 (1973); *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971).

If the State may exclude party designations from the ballot, it surely may exclude party endorsements from candidate statements contained in the official voter pamphlet prepared by the government and distributed to prospective voters. It is settled that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981). The voter information pamphlet obviously is not a traditional public forum, and its use may be limited to its intended purpose, which is to inform voters about *nonpartisan* elections. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46, n. 7 (1983). Refusing to permit references in candidate statements to party endorsements is therefore plainly constitutional.

Accordingly, I would reverse the judgment of the Court of Appeals.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, dissenting.

Article II, § 6(b) of the California Constitution provides that "[n]o political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." In a form of action extremely familiar to the federal courts, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *Eu* v. *San Francisco County Democratic Central Committee*, 489 U. S. 214 (1989); *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208 (1986), respondents brought a pre-enforcement challenge to § 6(b), seeking a declaration that § 6(b) violates the First Amendment and an injunction against its application to candidate statements published in official "voter pamphlets." We granted certiorari in this case, 498 U. S. 1046 (1991), to review the decision of the Ninth Circuit, sitting *en banc*, that § 6(b) violates the First Amendment.

The majority vacates the judgment below and remands the case with instructions to dismiss. It does so not because it disagrees with the merits of respondents' constitutional claim; indeed, the majority never reaches the merits. Rather, the majority finds a threshold defect in the "justiciability" of this case that did not occur to any of the courts below or to any party in more than three years of prior proceedings. Federal courts, of course, are free to find, on their own motion, defects in jurisdiction at any stage in a suit. But the majority's conclusion that respondents have failed to demonstrate a "live controversy ripe for resolution by the federal courts," *ante*, at 315, is simply not supported by the record of this case or by the teachings of our precedents. Because I cannot accept either the views expressed in, or the result reached by, the majority's opinion, and because I would affirm the decision of the Ninth Circuit on the merits, I dissent.

I

I consider first the question of justiciability. Respondents are 10 registered California voters, including a chairman and certain individual members of the local Democratic and Republican Party central committees.[1] Respondents' complaint alleges that petitioner municipal officials relied upon § 6(b) to adopt a policy of deleting "all references . . . to [party] endorsement[s]" from candidate statements submitted for inclusion in official "voter pamphlets" and that petitioners have announced their intention to make such redactions in future elections. App. 5, ¶ 38. The existence of the redaction policy is expressly admitted by petitioners in their answer. See *id.*, at 9, ¶ XIV. Respondents maintain that this policy frustrates the "desire [of respondent committee members] . . . to publicize [party] endorsements" and the "desire [of all respondents] to read endorsements" in the voter pamphlets. *Id.*, at 4–5, ¶¶ 36–37. The complaint prays for a declaration that § 6(b) violates the First Amendment and for an injunction against petitioners' continued enforcement of § 6(b) by means of the redaction policy. *Id.*, at 6, ¶¶ 3, 6.

I would have thought it quite obvious that these allegations demonstrate a justiciable controversy. In cases in precisely the same posture as this one, we have repeatedly entertained pre-enforcement challenges to laws restricting election-related speech. See, *e. g.*, *Buckley* v. *Valeo*, *supra*, at 12 (1976); *Eu* v. *San Francisco Democratic Central Committee*, *supra*; see also *Tashjian* v. *Republican Party of Connecticut*, *supra*. Indeed, standing and ripeness arguments nearly identical to those canvassed by the majority today were expressly considered and rejected by the Ninth

[1] In addition, there is one organization respondent, Election Action, which is committed to placing certain referenda matters on the ballot in California. As the majority notes, see *ante*, at 314–315, Election Action asserts no stake in this litigation independent of the individual voters who constitute its membership.

Circuit in *Eu*, see *San Francisco County Democratic Central Committee* v. *Eu*, 826 F. 2d 814, 821–824 (1987), which no doubt explains why the lower courts and the parties did not even bother to return to these issues in this case.

Essentially ignoring the wealth of relevant case law, the majority proceeds as if the justiciability questions presented by this case—questions of standing and ripeness—were novel and unresolved. On the issue of standing, the majority purports to find "serious questions" concerning respondents' entitlement to challenge §6(b). *Ante*, at 318. Since mere "questions" about standing cannot sustain the dismissal of a suit, one wonders why the majority offers dicta of this kind. As it turns out, the majority uses this opportunity to espouse a novel basis for denying a party standing; the proffered theory is both illogical and unsupported by any precedent. As for ripeness, which the majority finds to be the dispositive jurisdictional defect, today's decision erroneously concludes that there is no "live dispute involving the actual or threatened application of §6(b) to bar particular speech." *Ante*, at 320. I am persuaded by neither the majority's "doubt" whether respondents have standing, *ante*, at 319, nor the majority's certainty that this case is unripe.

A

In order to demonstrate standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984). In my view, "careful . . . examination of [the] complain[t]," *id.*, at 752, makes it clear that these requirements are met in this case. *All* of the individual respondents are registered voters in California. See App. 2, ¶1. Moreover, *all* allege that petitioners' redaction policy has injured them in that capacity by restricting election-related speech that respondents wish to consume. See *id.*, at 5, ¶¶37–38. As the majority acknowledges, see *ante*, at 319, our cases recognize that "lis-

teners" suffer a cognizable First Amendment injury when the State restricts speech for which they were the intended audience. See, *e. g.*, *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756–757 (1976); see also *San Francisco County Democratic Central Committee* v. *Eu*, *supra*, (applying "listener" standing in election-law setting), aff'd, 489 U. S. 214 (1989). Nor can there be any doubt that the injury that respondents allege as listeners of election speech is "fairly traceable" to petitioners' redaction policy. Finally, this injury would, in my view, be redressed by the relief requested by respondents, for an injunction against the redaction policy would prevent petitioners from continuing to block respondents' access to committee endorsements in voter pamphlets.

The majority's "doubt" about respondents' entitlement to proceed on a listener-standing theory[2] relates wholly to redressability. The majority notes that a provision in the California Elections Code bars inclusion of a candidate's party affiliation in the statement submitted for publication in a voter pamphlet. See Cal. Elec. Code Ann. § 10012 (West 1977 and Supp. 1991). The majority speculates that, if respondents succeed in invalidating § 6(b), petitioners might henceforth rely on § 10012 as a basis for continuing their policy of deleting endorsements. See *ante*, at 319. Articulating a novel theory of standing, the majority reasons that the registrar's possible reliance upon § 10012 to implement the same policy currently justified by reference to § 6(b) would defeat the redressability of respondents' listener injury.

[2] Because all respondents clearly have standing as potential receivers of protected speech, it is unnecessary to resolve whether certain respondents also have standing, in their capacity as committee members, to contest deletion from voter pamphlets of the committee's endorsement. Were this the only available basis for respondents' standing, it would be necessary to determine whether individual committee members may challenge infringement of the right to publicize an endorsement that is issued by the committee as a whole. As the majority points out, this matter is "unsettled." *Ante*, at 320.

In my view, this theory is not only foreign to our case law[3] but is also clearly wrong. If the existence of overlapping laws could defeat redressability, legislatures would simply pass "backup" laws for all potentially unconstitutional measures. Thereafter, whenever an aggrieved party brought suit challenging the State's infringement of his constitutional rights under color of one law, the State could advert to the existence of the previously unrelied-upon backup law as an alternative basis for continuing its unconstitutional policy, thereby defeating the aggrieved party's standing.

I cannot believe that Article II contemplates such an absurd result. Obviously, if respondents succeed on the merits of their constitutional challenge to § 6(b), the immediate effect will be to permit candidates to include endorsements in the voter pamphlet. This is so because no other law (and no other interpretation of a law that petitioners have formally announced) purports to bar inclusion of such endorsements. Perhaps, as the majority speculates, see *ante*, at 319, petitioners will subsequently attempt to reinstate their redaction policy under some legal authority other than § 6(b). But whether or not they ultimately do so has no consequence here. Just as a plaintiff cannot satisfy the redressability component of standing by showing that there is only a *possibility* that a defendant will respond to a court judgment by ameliorating the plaintiff's injury, see *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 43 (1976), so a defendant cannot defeat the plaintiff's standing to seek a favorable judgment simply by alleging a possibility that the defendant may

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[3] In support of its novel approach to standing, the majority cites no cases in which an injury was deemed unredressable because the challenged government conduct might have been—but was not—justified with reference to some law other than the one upon which the government officials relied. Indeed, the only precedents that the majority cites, *ante*, at 319, are decisions imposing the general requirement that injuries be redressable. Stated at that level of generality, the principle is uncontrovertible—but it is also of no help to the majority here.

subsequently act to undermine that judgment's ameliorating effect.

B

Under our precedents, the question whether a pre-enforcement challenge to a law is ripe "is decided on a case-by-case basis, by considering [1] the likelihood that the complainant will disobey the law, [2] the certainty that such disobedience will take a particular form, [3] any present injury occasioned by the threat of [enforcement], and [4] the likelihood that [enforcement efforts] will actually ensue." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143, n. 29 (1974). Like the pre-enforcement challenges in *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *Eu* v. *San Francisco Democratic Central Committee*, 489 U. S. 214 (1989); and *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208 (1986), this case easily satisfies these requirements.

The record clearly demonstrates the likelihood of both future disobedience of § 6(b) and future enforcement of that provision by way of petitioners' redaction policy. As even the majority acknowledges, see *ante*, at 321, some respondent central committee members have expressed an intention to continue endorsement of candidates for nonpartisan offices. Indeed, the chairman of one committee, in addition to identifying the specific candidates that the committee has endorsed in past elections, states in an affidavit that it is the committee's "plan and intention . . . to endorse candidates for nonpartisan offices in as many future elections as possible." App. 15. Likewise, as the majority acknowledges, see *ante*, at 322, petitioners expressly admit in their answer to the complaint that they intend to enforce § 6(b) by deleting all references to party endorsements from candidate statements submitted for inclusion in official voter pamphlets. See App. 9, ¶ XIV. Of course, petitioners will have occasion to enforce § 6(b) in this manner only if candidates seek to include such endorsements in their statements. Respondents allege and petitioners concede, however, that candidates have

sought to advert to such endorsements in their statements in the past and that petitioners have always deleted them from the voter pamphlets. *Id.*, at 5, ¶38; *id.*, at 9, ¶XIV. When combined with the clearly expressed intentions of the parties, these allegations of "past wrongs" furnish sufficient evidence of "a real and immediate threat of repeated injury." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974).

It is also clear that respondents have alleged sufficient "present injury occasioned by the threat of [future enforcement]." *Regional Rail Reorganization Act Cases*, *supra*, at 143, n. 29. Obviously, the reason that parties bring pre-enforcement challenges to laws that restrict election-related speech is to avoid the risk that a court will be unable to dispose of a postenforcement challenge quickly enough for the challenging parties to participate in a scheduled election. *Buckley* v. *Valeo*, *supra*. Our mootness jurisprudence responds to this dilemma by applying the capable-of-repetition-yet-evading-review doctrine to preserve the justiciability of an election-law challenge even after the election at issue has taken place. See, *e. g.*, *Anderson* v. *Celebrezze*, 460 U. S. 780, 784, n. 3 (1983); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 774–775 (1978); *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974); *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969). But insofar as the purpose of entertaining a case in that mootness posture is not to remedy past wrongs but rather to "simplif[y] *future* challenges [and] thus increas[e] the likelihood that timely filed cases can be adjudicated before an election is held," *Storer* v. *Brown*, *supra*, at 737, n. 8 (emphasis added), it would be quite anomalous if ripeness doctrine were less solicitous of the interests of a party who brings a pre-enforcement challenge.

For this reason, it is surely irrelevant that the record does not demonstrate an "imminent application of §6(b)." *Ante*, at 322. So long as the plaintiff credibly alleges that he plans to disobey an election law and that government officials plan to enforce it against him, he should not be forced to defer

initiation of suit until the election is so "imminent" that it may come and go before his challenge is adjudicated. See *Regional Rail Reorganization Act Cases*, *supra*, at 143 ("'One does not have to await the consummation of threatened injury to obtain preventive relief,'" quoting *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923)). Indeed, in *Buckley* v. *Valeo*, *supra*, we held a pre-enforcement challenge to be justiciable even though the case was filed in the District Court nearly two years before the next scheduled national election. See *id.*, at 11–12. Similarly, nothing in *Eu* v. *San Francisco Democratic Central Committee*, *supra*, and *Tashjian* v. *Republican Party of Connecticut*, *supra*, suggests that elections were "imminent" when those cases were filed.

Most of the majority's concerns about the ripeness of this dispute arise from the majority's uncertainty as to the "particular form" of future violations of § 6(b). See *Regional Rail Reorganization Act Cases*, *supra*, at 143, n. 29. The majority notes, for example, that "[r]espondents do not allege an intention to endorse any particular candidate." *Ante*, at 321. Similarly, the majority objects that "[w]e do not know the nature of the endorsement [that the parties will next make], how it would be publicized, or the precise language petitioners might delete from the voter pamphlet." *Ante*, at 322.

In my view, these uncertainties do not detract in the slightest from the ripeness of this case. The form of future disobedience can only matter in ripeness analysis to the extent that it bears on the merits of a plaintiff's pre-enforcement challenge. The majority never bothers to explain how the identity of the endorsed candidates, the "nature" of the endorsement, the mode of publicity (outside of candidate statements submitted for inclusion in voter pamphlets), or the precise language that petitioners might delete from the pamphlets affects the merits of respondents' challenge. Indeed, it is quite apparent that none of these questions is relevant.

In *Eu* v. *San Francisco Democratic Central Committee*, 489 U. S. 214 (1989), we struck down a similar California provision that barred party endorsements in primary elections for partisan offices. See *id.*, at 222–229. Nothing in our analysis turned on the identity of the candidates to be endorsed, the nature or precise language of the endorsements, or the mode of publicizing the endorsements. Similarly, here we can dispose of respondents' challenge to § 6(b) knowing simply that party central committees will continue to make endorsements of candidates for nonpartisan offices and that petitioners will continue to redact those endorsements from the voter pamphlets.[4]

II

Because I conclude that the controversy before us is justiciable, I would reach the merits of respondents' challenge. In my view, it is clear that § 6(b) violates the First Amendment.

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[4] The majority cites a series of decisions to support its view that we do not know enough about the expressive activity restricted by § 6(b) to evaluate its constitutionality. *Ante*, at 322. The Court's reasoning in the cited precedents, however, only confirms the deficiencies in the majority's analysis here. For example, in *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 576–580 (1947), the Court found the dispute unripe for adjudication because it was unsure which criminal statutes would be applied to the petitioner or which other code sections were incorporated by reference in those statutes; in *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 586 (1972), the Court found "no allegation of injury that the party has suffered *or will suffer* because of the existence of the [law challenged]" (emphasis added); and in *Public Affairs Associates, Inc.* v. *Rickover*, 369 U. S. 111, 113 (1962), involving a public official's disputed authorship rights in his speeches, the Court found the record "woefully lacking" because it omitted details—such as whether the official used government facilities and personnel to prepare his speeches—that bore directly upon the legal issue. Unlike the situation in these precedents, the respondents in this case have clearly identified the law that will be enforced to their detriment, the injury that will flow from that enforcement, and the relevant facts surrounding such enforcement.

A

At the outset, it is necessary to be more precise about the nature of respondents' challenge. In effect, respondents' complaint states two possible First Amendment theories. The first is that § 6(b), as that provision has been *applied* to delete endorsements from voter pamphlets, violates the First Amendment. See App. 4–5, ¶¶ 36–39(a). The second is that § 6(b) *on its face* violates the First Amendment because it "purports to outlaw actions by county central committees . . . to endorse, support or oppose candidates for city or county offices." *Id.*, at 4, ¶ 35. This second theory can be understood as an overbreadth challenge: that is, a claim that regardless of whether § 6(b) violates the First Amendment in its *peripheral effect* of excluding references to party endorsements from candidates' statements, § 6(b) is unconstitutional in its *primary effect* of barring parties and party committees from making endorsements. See *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 965–966 (1984) (party who suffers unwanted but constitutionally permissible effect of a law may nonetheless succeed in voiding that law by showing that "there is no core of easily identifiable and constitutionally proscribable conduct that the [provision] prohibits").[5]

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[5] The majority expresses "doubt that respondents' complaint should be construed to assert a facial challenge to § 6(b)" because the complaint prays for an injunction only against petitioners' redaction policy and because "[r]eferences to other applications of § 6(b) [in the complaint] are at best conclusory." *Ante*, at 323–324. JUSTICE WHITE's dissenting opinion expresses a similar view. *Ante*, at 328, 330. But neither the majority nor JUSTICE WHITE explains why a party raising an overbreadth challenge must seek to enjoin applications of an invalid law other than the application that is injuring him. Moreover, to require a broader request for injunctive relief here would be both unfair and unnecessary. Although respondents know which officials should be enjoined in order to halt the redaction of voter pamphlets, respondents cannot know who will next enforce § 6(b) against party central committees that seek to endorse nonpartisan candidates. See, *e. g.*, *Unger* v. *Superior Court*, 37 Cal. 3d 612, 692 P. 2d 238

As the majority notes, it is this Court's "usual . . . practice . . . [not] to proceed to an overbreadth issue . . . before it is determined that the statute would be valid as applied." *Board of Trustees, State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 484–485 (1989). This is so because

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(1984) (injunction sought by two registered voters against party's announcement of opposition to justices at confirmation election); *Unger* v. *Superior Court*, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980), cert. denied, 449 U. S. 1131 (1981) (injunction against party endorsement sought by rival candidate who was not endorsed). Should respondents obtain the declaratory relief that they seek, any future attempts to enforce § 6(b) against a political party could easily be defeated by invoking that declaratory judgment. In sum, respondents' request for a declaratory judgment that § 6(b) is unconstitutional furnishes ample basis for inferring that their complaint includes a facial challenge to § 6(b).

The insistence by the majority and by JUSTICE WHITE that a party expressly style his claim in his complaint as a challenge based on overbreadth is also inconsistent with the liberal "notice pleading" philosophy that informs the Federal Rules of Civil Procedure. See *Conley* v. *Gibson*, 355 U. S. 41, 47–48 (1957); see generally *Fitzgerald* v. *Codex Corp.*, 882 F. 2d 586, 589 (CA1 1989) ("[U]nder Fed. R. Civ. P. 8 it is not necessary that a legal theory be pleaded in the complaint if plaintiff sets forth 'sufficient factual allegations to state a claim showing that he is entitled to relief' under *some* [tenable] legal theory" (emphasis in original)). I am particularly perplexed by JUSTICE WHITE's determination that "[t]he courts below *erred* in treating respondents' challenge in this case as a facial challenge." *Ante*, at 328 (emphasis added). At every stage of this litigation, beginning with respondents' summary judgment motion, the parties have framed the constitutional question exclusively in terms of § 6(b)'s application to party endorsements, precisely the overbreadth argument that JUSTICE WHITE declines to reach. See Points and Authorities in Support of Summary Judgment in No. C–87–4724 AJZ (ND Cal.), pp. 22–26; Memorandum of Points and Authorities in Opposition to Summary Judgment in No. C–87–4724 AJZ (ND Cal.), pp. 20–41; Brief of Appellant in No. 88–2875 (CA9), pp. 7–18; Brief of Appellees in No. 88–2875 (CA9), pp. 5–36. In such circumstances, I do not understand what authority this Court would have for reversing the decision below, *sua sponte*, simply because the lower courts upheld a theory of relief not expressly relied upon in the complaint. See generally 5 C. Wright and A. Miller, Federal Practice and Procedure § 1219, p. 190 (2d ed. 1990) (text of Federal Rules "makes it very plain that the theory of the pleadings mentality has no place under federal practice").

> "the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial* . . . 'judged in relation to the statute's plainly legitimate sweep,' . . . and therefore requires consideration of many more applications than those immediately before the court." *Id.*, at 485 (emphasis in original), quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973).

Nonetheless, the rule that a court should consider as-applied challenges before overbreadth challenges is not absolute. See, *e. g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 573–574 (1987) (considering overbreadth challenge first); *Houston* v. *Hill*, 482 U. S. 451, 458–467 (1987) (same). Rather, the rule represents one prudential consideration among many in determining the order in which to evaluate particular constitutional challenges.

In my opinion, competing prudential factors clearly support considering respondents' overbreadth challenge first in this case. Unlike the situation in *Fox*, the as-applied challenge here is actually more difficult to resolve than is the overbreadth challenge. Insofar as they attack petitioners' redaction policy as unconstitutional, respondents must be understood to argue that they have a right *to receive* particular messages by means of official voter pamphlets or a right *to communicate* their own messages by that means. Either way, this argument would require us to determine the "public forum" status of the voter pamphlets, cf. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 48 (1983), an issue on which the law is unsettled, see generally L. Tribe, American Constitutional Law § 12–24, p. 987 (2d ed. 1988) (noting "blurriness . . . of the categories within the public forum classification"). By contrast, respondents' overbreadth challenge is easily assessed. In the first place, the application of § 6(b) to party speech that "endorse[s], support[s], or oppose[s] a[ny] candidate for nonpartisan office" clearly is "substantial" when compared with § 6(b)'s only alleged "legitimate" application, namely, the redaction of voter

pamphlets. Moreover, the constitutional doctrine relevant to § 6(b)'s restriction of party speech is well settled. See *Eu* v. *San Francisco Democratic Central Committee*, 489 U. S. 214 (1989). Rather than undertaking to determine what sort of "public forum" voter pamphlets might constitute—a finding that could have broad ramifications, see, *e. g.*, *Patterson* v. *Board of Supervisors of City and County of San Francisco*, 202 Cal. App. 3d 22, 248 Cal. Rptr. 253 (1988) (suit challenging constitutionality of §§ 3795 and 5025 of California Elections Code, authorizing deletions from arguments about ballot propositions in the voter pamphlet)—a court should, if possible, resolve this constitutional challenge by well-settled doctrine. See, *e. g.*, *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 525–526 (1989) (O'CONNOR, J., concurring in part and concurring in judgment).

In addition, both the District Court and the Court of Appeals disposed of respondents' challenge on overbreadth grounds, and that is the only theory briefed by the parties in this Court. Because the as-applied component of respondents' challenge has not been fully aired in these proceedings, resolving the case on that basis presents a significant risk of error. For these reasons, I turn to respondents' overbreadth challenge, which I find to be dispositive of this case.[6]

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[6] It is, of course, no impediment to proceeding on an overbreadth theory that petitioners' redaction policy supplies the ripe controversy in this case. The thrust of an overbreadth challenge is that a party is entitled "not to be bound by a [provision] that is unconstitutional." *Board of Trustees, State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 485 (1989). Thus, a pre-enforcement overbreadth challenge is ripe so long as the party can show that state actors will foreseeably apply a facially invalid law in a way that determines *his* rights. He need not show, in addition, that state actors are about to apply the law to third parties in the precise manner that renders the law facially invalid. As I have shown, respondents demonstrate a ripe dispute by credibly alleging that petitioners will apply § 6(b) in a manner that determines respondents' right to receive election-related speech in official voter pamphlets.

B

Conceived of as an overbreadth challenge, respondents' First Amendment attack upon § 6(b) closely resembles the issue presented in *Eu* v. *San Francisco Democratic Central Committee*, *supra*. As I have noted, *Eu* struck down on First Amendment grounds a California law that prohibited the party central committees from "'endors[ing], support-[ing], or oppos[ing]'" any candidate in primary elections for partisan offices. *Id.*, at 217. We concluded in *Eu* that this "ban directly affect[ed] speech which 'is at the core of our electoral process and of the First Amendment freedoms.'" *Id.*, at 222–223, quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968). We also determined that this prohibition was unsupported by any legitimate compelling state interest. The State defended the endorsement ban on the ground that it was necessary to prevent voter "confusion and undue [party] influence." See 489 U. S., at 228. Properly understood, this claim amounted to no more than the proposition that the State could protect voters from being exposed to information on which they might rationally rely, a "'highly paternalistic'" function to which the State could not legitimately lay claim. *Id.*, at 223, quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 770; see 489 U. S., at 228–229.

In my view, this case is directly controlled by *Eu*. As in *Eu*, there can be no question here that the endorsements that § 6(b) purports to make unlawful constitute core political speech. And, as in *Eu*, this prohibition is unsupported by any *legitimate* compelling state interest. Petitioners assert that § 6(b) advances a compelling state interest because it assures that "local government and judges in California are . . . controlled by the people [rather than] by those who run political parties." Brief for Petitioners 7. The only kind of "control" that § 6(b) seeks to prohibit, however, is that which "those who run political parties" are able to exert over voters through issuing party endorsements. In effect, then,

petitioners are arguing that the State has an interest in protecting "the people" from their own susceptibility to being influenced by political speech. This is the very sort of paternalism that we deemed illegitimate in *Eu*.

Drawing on our decision in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990), petitioners try to repackage the State's concern to protect voters from themselves as an interest in avoiding "corruption" of the electoral process. The law that was at issue in *Austin* barred corporations from making political expenditures from their corporate treasuries in favor of, or in opposition to, political candidates. We upheld the constitutionality of that law, finding that a State could legitimately prohibit "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.*, at 660. Petitioners argue that California similarly should be able to prohibit political parties from using their special place in the political process to exercise a disruptive effect upon the election of nonpartisan office holders.

Petitioners' reliance on *Austin* is unavailing. The political activity that § 6(b) limits in this case is not the expenditure of money to further a viewpoint but merely the announcement of that viewpoint in the form of an endorsement. It is difficult to imagine how a political party's announcement of its view about a candidate could exert an influence on voters that has "little or no correlation to the public's support for the [party's] political ideas." *Ibid.* On the contrary, whatever influence a party wields in expressing its views results directly from the trust that it has acquired among voters.

Thus, whereas the *Austin* Court worried that corporations might dominate elections with capital they had only accumulated by dint of "'economically motivated decisions of investors and customers,'" *id.*, at 659, the party endorsements in this case represent an expenditure of *political* capital accu-

mulated through past voter support. And, whereas the special benefits conferred by state law in *Austin* "enhance[d]" the corporations' "ability to attract capital," *ibid.*, the benefits California confers upon parties—*e. g.*, permitting taxpayers to make voluntary contributions to parties on their tax returns—should have little effect on the parties' acquisition of *political* capital. In sum, the prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process.

In the final analysis, § 6(b) and the arguments that petitioners advance in support of it reflect an ambivalence about the democratic process itself. The possibility that judges and other elective nonpartisan office holders will fall under the influence of political parties is inherent in an electoral system in which voters look to others, including parties, for information relevant to exercise of the franchise. Of course, it is always an option for the State to end the influence of the parties by making these offices appointive rather than elective positions. But the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process—voters, candidates, *and* parties—the First Amendment rights that attach to their roles.

Because § 6(b) clearly fails to meet this standard, and because I believe that the lower courts properly determined that they were in a position to reach this conclusion *now*, I would affirm the judgment of the Ninth Circuit. Consequently, I dissent.

LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW *v.* GILBERTSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–333. Argued February 19, 1991—Decided June 20, 1991

During 1979 through 1981, plaintiff-respondents purchased units in seven Connecticut limited partnerships, with the expectation of realizing federal income tax benefits. Among other things, petitioner, a New Jersey law firm, aided in organizing the partnerships and prepared opinion letters addressing the tax consequences of investing. The partnerships failed, and, subsequently, the Internal Revenue Service disallowed the claimed tax benefits. In 1986 and 1987, plaintiff-respondents filed complaints in the Federal District Court for the District of Oregon, alleging that they were induced to invest in the partnerships by misrepresentations in offering memoranda prepared by petitioner and others, in violation of, *inter alia*, § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5, and asserting that they became aware of the alleged misrepresentations only in 1985. The court granted summary judgment for the defendants on the ground that the complaints were not timely filed, ruling that the claims were governed by Oregon's 2-year limitations period for fraud claims, the most analogous forum-state statute; that plaintiff-respondents had been on notice of the possibility of fraud as early as 1982; and that there were no grounds sufficient to toll the statute of limitations. The Court of Appeals also selected Oregon's limitations period, but reversed, finding that there were unresolved factual issues as to when plaintiff-respondents should have discovered the alleged fraud.

Held: The judgment is reversed.

895 F. 2d 1416, 1417, and 1418, reversed.

JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, concluding that:

1. Litigation instituted pursuant to § 10(b) and Rule 10b–5 must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation, as provided in the 1934 Act and the Securities Act of 1933. State-borrowing principles should not be applied where, as here, the claim asserted is one implied under a statute also containing an express cause of action with its own time limitation. The 1934 Act contemporaneously enacted a number of express remedial provisions actually designed to accommodate a balance of interests very similar to that at stake in this litigation. And the limitations periods in all but one of its causes of action include some variation

of a 1-year period after discovery combined with a 3-year period of repose. Moreover, in adopting the 1934 Act, Congress also amended the 1933 Act, adopting the same structure for each of its causes of action. Neither the 5-year period contained in the 1934 Act's insider-trading provision, which was added in 1988, nor state-law fraud provides a closer analogy to § 10(b). Pp. 358–362.

2. The limitations period is not subject to the doctrine of equitable tolling. The 1-year period begins after discovery of the facts constituting the violation, making tolling unnecessary, and the 3-year limit is a period of repose inconsistent with tolling. P. 363.

3. As there is no dispute that the earliest of plaintiff-respondents' complaints was filed more than three years after petitioner's alleged misrepresentations, plaintiff-respondents' claims were untimely. P. 364.

BLACKMUN, J., delivered the opinion of the Court with respect to Parts I, II–B, II–C, III, and IV, in which REHNQUIST, C. J., and WHITE, MARSHALL, and SCALIA, JJ., joined, and an opinion with respect to Part II–A, in which REHNQUIST, C. J., and WHITE and MARSHALL, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 364. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 366. O'CONNOR, J., filed a dissenting opinion, in which KENNEDY, J., joined, *post*, p. 369. KENNEDY, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 374.

Theodore B. Olson argued the cause for petitioner. With him on the briefs were *Theodore J. Boutrous, Jr.*, *S. Joel Wilson*, and *R. Daniel Lindahl*. *Stephen M. Shapiro* and *Mark I. Levy* filed a brief for Comdisco, Inc., et al., as respondents under this Court's Rule 12.4, in support of petitioner.

F. Gordon Allen argued the cause for respondents Gilbertson et al. With him on the brief were *Barry W. Dod* and *Gary M. Berne*.*

**Eldon Olson*, *Jon N. Ekdahl*, *Harris J. Amhowitz*, *Carl D. Liggio*, and *Leonard P. Novello* filed a brief for Arthur Andersen & Co. et al. as *amici curiae* urging reversal.

Leonard Barrack filed a brief for the National Association of Securities and Commercial Law Attorneys as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Securities and Exchange Commission by *Solicitor General Starr*, *Deputy Solicitor General Roberts*, *Michael R. Dreeben*, *James R. Doty*, *Paul Gonson*, and *Jacob H. Stillman*; for the American Council of Life Insurance by *Lawrence J. Latto*, *John Townsend Rich*, *Richard E. Barnsback*, and *Phillip E. Stano*; for the

JUSTICE BLACKMUN delivered the opinion of the Court, except as to Part II–A.

In this litigation we must determine which statute of limitations is applicable to a private suit brought pursuant to § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), and to Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (1990), promulgated thereunder.

I

The controversy arises from the sale of seven Connecticut limited partnerships formed for the purpose of purchasing and leasing computer hardware and software. Petitioner Lampf, Pleva, Lipkind, Prupis & Petigrow is a West Orange, N. J., law firm that aided in organizing the partnerships and that provided additional legal services, including the preparation of opinion letters addressing the tax consequences of investing in the partnerships. The several plaintiff-respondents purchased units in one or more of the partnerships during the years 1979 through 1981 with the expectation of realizing federal income tax benefits therefrom.

The partnerships failed, due in part to the technological obsolescence of their wares. In late 1982 and early 1983, plaintiff-respondents received notice that the United States Internal Revenue Service was investigating the partnerships. The IRS subsequently disallowed the claimed tax benefits because of overvaluation of partnership assets and lack of profit motive.

On November 3, 1986, and June 4, 1987, plaintiff-respondents filed their respective complaints in the United States District Court for the District of Oregon, naming as defendants petitioner and others involved in the preparation

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Bond Investors Association by *David J. Guin, David R. Donaldson, J. Michael Rediker,* and *Thomas L. Krebs;* and for the Securities Industry Association by *Thomas C. Walsh, John Michael Clear, Leo J. Asaro,* and *William J. Fitzpatrick.*

of offering memoranda for the partnerships. The complaints alleged that plaintiff-respondents were induced to invest in the partnerships by misrepresentations in the offering memoranda, in violation of, among other things, § 10(b) of the 1934 Act and Rule 10b–5. The claimed misrepresentations were said to include assurances that the investments would entitle the purchasers to substantial tax benefits; that the leasing of the hardware and software packages would generate a profit; that the software was readily marketable; and that certain equipment appraisals were accurate and reasonable. Plaintiff-respondents asserted that they became aware of the alleged misrepresentations only in 1985 following the disallowance by the IRS of the tax benefits claimed.

After consolidating the actions for discovery and pretrial proceedings, the District Court granted summary judgment for the defendants on the ground that the complaints were not timely filed. App. to Pet. for Cert. 22A. Following precedent of its controlling court, see, *e. g.*, *Robuck* v. *Dean Witter & Co.*, 649 F. 2d 641 (CA9 1980), the District Court ruled that the securities claims were governed by the state statute of limitations for the most analogous forum-state cause of action. The court determined this to be Oregon's 2-year limitations period for fraud claims, Ore. Rev. Stat. § 12.110(1) (1989). The court found that reports to plaintiff-respondents detailing the declining financial status of each partnership and allegations of misconduct made known to the general partners put plaintiff-respondents on "inquiry notice" of the possibility of fraud as early as October 1982. App. to Pet. for Cert. 43A. The court also ruled that the distribution of certain fiscal reports and the installation of a general partner previously associated with the defendants did not constitute fraudulent concealment sufficient to toll the statute of limitations. Applying the Oregon statute to the facts underlying plaintiff-respondents' claims, the District Court determined that each complaint was time barred.

The Court of Appeals for the Ninth Circuit reversed and remanded the cases. See, *e. g.*, *Reitz* v. *Leasing Consultants Associates*, 895 F. 2d 1418 (1990) (judgment order). In its unpublished opinion, the Court of Appeals found that unresolved factual issues as to when plaintiff-respondents discovered or should have discovered the alleged fraud precluded summary judgment. Then, as did the District Court, it selected the 2-year Oregon limitations period. In so doing, it implicitly rejected petitioner's argument that a federal limitations period should apply to Rule 10b–5 claims. App. to Pet. for Cert. 8A. In view of the divergence of opinion among the Circuits regarding the proper limitations period for Rule 10b–5 claims,[1] we granted certiorari to address this important issue. 498 U. S. 894 (1990).

II

Plaintiff-respondents maintain that the Court of Appeals correctly identified common-law fraud as the source from which § 10(b) limitations should be derived. They submit that the underlying policies and practicalities of § 10(b) litigation do not justify a departure from the traditional practice of "borrowing" analogous state-law statutes of limitations. Petitioner, on the other hand, argues that a federal period is appropriate, contending that we must look to the "1-and-3-year" structure applicable to the express causes of action in § 13 of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77m, and to certain of the express actions in the

[1] See, *e. g.*, *Nesbit* v. *McNeil*, 896 F. 2d 380 (CA9 1990) (applying state limitations period governing common-law fraud); *Bath* v. *Bushkin, Gaims, Gaines and Jonas*, 913 F. 2d 817 (CA10 1990) (same); *O'Hara* v. *Kovens*, 625 F. 2d 15 (CA4 1980) (applying state blue sky limitations period), cert. denied, 449 U. S. 1124 (1981); *Forrestal Village, Inc.* v. *Graham*, 179 U. S. App. D. C. 225, 551 F. 2d 411 (1977) (same); *In re Data Access Systems Securities Litigation*, 843 F. 2d 1537 (CA3) (establishing uniform federal period), cert. denied *sub nom. Vitiello* v. *I. Kahlowsky & Co.*, 488 U. S. 849 (1988); *Short* v. *Belleville Shoe Mfg. Co.*, 908 F. 2d 1385 (CA7 1990), cert. pending, No. 90–526 (same).

1934 Act, see 15 U. S. C. §§ 78i(e), 78r(c), and 78cc(b).[2] The Solicitor General, appearing on behalf of the Securities and Exchange Commission, agrees that use of a federal period is indicated, but urges the application of the 5-year statute of repose specified in § 20A of the 1934 Act, 15 U. S. C. § 78t–1(b)(4), as added by § 5 of the Insider Trading and Securities Fraud Enforcement Act of 1988, 102 Stat. 4681. The 5-year period, it is said, accords with "Congress's most recent views on the accommodation of competing interests, provides the closest federal analogy, and promises to yield the best practical and policy results in Rule 10b–5 litigation." Brief for Securities and Exchange Commission as *Amicus Curiae* 8. For the reasons discussed below, we agree that a uniform federal period is indicated, but we hold that the express causes of action contained in the 1933 and 1934 Acts provide the source.

A

It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court "borrows" or "absorbs" the local time limitation most analogous to the case at hand. *Wilson* v. *Garcia*, 471 U. S. 261, 266–267 (1985); *Automobile Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 704 (1966); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895). This practice, derived from the Rules of Decision Act, 28 U. S. C. § 1652, has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily "intends by its silence that we borrow state law." *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 147 (1987).

The rule, however, is not without exception. We have recognized that a state legislature rarely enacts a limitations period with federal interests in mind, *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 367 (1977), and when the op-

[2] Although not identical in language, all these relate to one year after discovery and to three years after violation.

eration of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period. See, *e. g.*, *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983); *Agency Holding Corp., supra; McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, 224 (1958). These departures from the state-borrowing doctrine have been motivated by this Court's conclusion that it would be "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." *DelCostello*, 462 U. S., at 161.

Rooted as it is in the expectations of Congress, the "state-borrowing doctrine" may not be lightly abandoned. We have described federal borrowing as "a closely circumscribed exception," to be made "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" *Reed* v. *United Transportation Union*, 488 U. S. 319, 324 (1989), quoting *DelCostello*, 462 U. S., at 172.

Predictably, this determination is a delicate one. Recognizing, however, that a period must be selected,[3] our cases do provide some guidance as to whether state or federal borrowing is appropriate and as to the period best suited to the cause of action under consideration. From these cases we are able to distill a hierarchical inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such an action must be brought.

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[3] On rare occasions, this Court has found it to be Congress' intent that no time limitation be imposed upon a federal cause of action. See, *e. g.*, *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355 (1977). No party in the present litigation argues that this was Congress' purpose in enacting § 10(b), and we agree that there is no evidence of such intent.

First, the court must determine whether a uniform statute of limitations is to be selected. Where a federal cause of action tends in practice to "encompass numerous and diverse topics and subtopics," *Wilson* v. *Garcia*, 471 U. S., at 273, such that a single state limitations period may not be consistently applied within a jurisdiction, we have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes. *Id.*, at 273–275. This conclusion ultimately may result in the selection of a single federal provision, see *Agency Holding Corp.*, *supra*, or of a single variety of state actions. See *Wilson* v. *Garcia* (characterizing all actions under 42 U. S. C. § 1983 as analogous to a state-law personal injury action).

Second, assuming a uniform limitations period is appropriate, the court must decide whether this period should be derived from a state or a federal source. In making this judgment, the court should accord particular weight to the geographic character of the claim:

> "The multistate nature of [the federal cause of action at issue] indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'" *Agency Holding Corp.*, 483 U. S., at 154, quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 392 (1985).

Finally, even where geographic considerations counsel federal borrowing, the aforementioned presumption of state borrowing requires that a court determine that an analogous federal source truly affords a "closer fit" with the cause of action at issue than does any available state-law source. Although considerations pertinent to this determination will neces-

sarily vary depending upon the federal cause of action and the available state and federal analogues, such factors as commonality of purpose and similarity of elements will be relevant.

B

In the present litigation, our task is complicated by the nontraditional origins of the § 10(b) cause of action. The text of § 10(b) does not provide for private claims.[4] Such claims are of judicial creation, having been implied under the statute for nearly half a century. See *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946), cited in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 196, n. 16 (1976). Although this Court repeatedly has recognized the validity of such claims, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 150–154 (1972); *Superintendent*

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[4] Section 10 of the 1934 Act provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j.

Commission Rule 10b–5, first promulgated in 1942, now provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1990).

of Ins. of N. Y. v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971), we have made no pretense that it was Congress' design to provide the remedy afforded. See *Ernst & Ernst*, 425 U. S., at 196 ("[T]here is no indication that Congress, or the Commission when adopting Rule 10b–5, contemplated such a remedy") (footnotes omitted). It is therefore no surprise that the provision contains no statute of limitations.

In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed. Fortunately, however, the drafters of § 10(b) have provided guidance.

We conclude that where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. See *DelCostello*, 462 U. S., at 171; *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 69–70 (1981) (opinion concurring in judgment). When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. Only where no analogous counterpart is available should a court then proceed to apply state-borrowing principles.

In the present litigation, there can be no doubt that the contemporaneously enacted express remedial provisions represent "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels." *DelCostello*, 462 U. S., at 169. The 1934 Act contained a number of express causes of action, each with an

explicit limitations period. With only one more restrictive exception,[5] each of these includes some variation of a 1-year period after discovery combined with a 3-year period of repose.[6] In adopting the 1934 Act, the 73d Congress also amended the limitations provision of the 1933 Act, adopting the 1-and-3-year structure for each cause of action contained therein.[7]

Section 9 of the 1934 Act, 15 U. S. C. § 78i, pertaining to the willful manipulation of security prices, and § 18, 15 U. S. C. § 78r, relating to misleading filings, target the precise dangers that are the focus of § 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: "to protect investors

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[5] Section 16(b), 15 U. S. C. § 78p(b), sets a 2-year rather than a 3-year period of repose. Because that provision requires the disgorgement of unlawful profits and differs in focus from § 10(b) and from the other express causes of action, we do not find § 16(b) to be an appropriate source from which to borrow a limitations period here.

[6] Section 9(e) of the 1934 Act provides:

"No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U. S. C. § 78i(e).

Section 18(c) of the 1934 Act provides:

"No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued." 15 U. S. C. § 78r(c).

[7] Section 13 of the 1933 Act, as so amended, provides:

"No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable dilligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale." 15 U. S. C. § 77m.

against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Ernst & Ernst*, 425 U. S., at 195, citing S. Rep. No. 792, 73d Cong., 2d Sess., 1–5 (1934).

C

We therefore conclude that we must reject the Commission's contention that the 5-year period contained in § 20A, added to the 1934 Act in 1988, is more appropriate for § 10(b) actions than is the 1-and-3-year structure in the Act's original remedial provisions. The Insider Trading and Securities Fraud Enforcement Act of 1988, which became law more than 50 years after the original securities statutes, focuses upon a specific problem, namely, the "purchasing or selling [of] a security while in possession of material, nonpublic information," 15 U. S. C. § 78t–1(a), that is, "insider trading." Recognizing the unique difficulties in identifying evidence of such activities, the 100th Congress adopted § 20A as one of "a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading." H. R. Rep. No. 100–910, p. 7 (1988). There is no indication that the drafters of § 20A sought to extend that enhanced protection to other provisions of the 1934 Act. Indeed, the text of § 20A indicates the contrary. Section 20A(d) states: "Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter." 15 U. S. C. § 78t–1(d).

The Commission further argues that because some conduct that is violative of § 10(b) is also actionable under § 20A, adoption of a 1-and-3-year structure would subject actions based on § 10(b) to two different statutes of limitations. But § 20A also prohibits insider trading activities that violate sections of

the 1934 Act with express limitations periods. The language of § 20A makes clear that the 100th Congress sought to alter the remedies available in insider trading cases, and *only* in insider trading cases. There is no inconsistency.

Finally, the Commission contends that the adoption of a 3-year period of repose would frustrate the policies underlying § 10(b). The inclusion, however, of the 1-and-3-year structure in the broad range of express securities actions contained in the 1933 and 1934 Acts suggests a congressional determination that a 3-year period is sufficient. See *Ceres Partners* v. *GEL Associates*, 918 F. 2d 349, 363 (CA2 1990).

Thus, we agree with every Court of Appeals that has been called upon to apply a federal statute of limitations to a § 10(b) claim that the express causes of action contained in the 1933 and 1934 Acts provide a more appropriate statute of limitations than does § 20A. See *Ceres Partners*, *supra*; *Short* v. *Belleville Shoe Mfg. Co.*, 908 F. 2d 1385 (CA7 1990), cert. pending, No. 90–526; *In re Data Access Systems Securities Litigation*, 843 F. 2d 1537 (CA3), cert. denied *sub nom. Vitiello* v. *I. Kahlowsky & Co.*, 488 U. S. 849 (1988).

Necessarily, we also reject plaintiff-respondents' assertion that state-law fraud provides the closest analogy to § 10(b). The analytical framework we adopt above makes consideration of state-law alternatives unnecessary where Congress has provided an express limitations period for correlative remedies within the same enactment.[8]

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[8] JUSTICE KENNEDY would borrow the 1-year limitations period contained in the 1934 Act but not the accompanying period of repose. In our view, the 1-and-3-year scheme represents an indivisible determination by Congress as to the appropriate cutoff point for claims under the statute. It would disserve that legislative determination to sever the two periods. Moreover, we find no support in our cases for the practice of borrowing only a portion of an express statute of limitations. Indeed, such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid.

III

Finally, we address plaintiff-respondents' contention that, whatever limitations period is applicable to § 10(b) claims, that period must be subject to the doctrine of equitable tolling. Plaintiff-respondents note, correctly, that "[t]ime requirements in lawsuits . . . are customarily subject to 'equitable tolling.'" *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990), citing *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989). Thus, this Court has said that in the usual case, "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey* v. *Glover*, 21 Wall. 342, 348 (1875); see also *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396–397 (1946). Notwithstanding this venerable principle, it is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure.

The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit." Bloomenthal, The Statute of Limitations and Rule 10b–5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 288 (1989). See also ABA Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions 645, 655 (1986) (advancing "the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws"). Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.

IV

Litigation instituted pursuant to § 10(b) and Rule 10b–5 therefore must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.[9] As there is no dispute that the earliest of plaintiff-respondents' complaints was filed more than three years after petitioner's alleged misrepresentations, plaintiff-respondents' claims were untimely.[10]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

Although I accept the *stare decisis* effect of decisions we have made with respect to the statutes of limitations applicable to particular federal causes of action, I continue to disagree with the methodology the Court has very recently adopted for purposes of making those decisions. In my view, absent a congressionally created limitations period state periods govern, or, if they are inconsistent with the purposes of the federal Act, no limitations period exists. See *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S.

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[9] The Commission notes, correctly, that the various 1-and-3-year periods contained in the 1934 and 1933 Acts differ slightly in terminology. To the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e) of the 1934 Act, 15 U. S. C. § 78i(e).

[10] Section 313(a) of the Judicial Improvements Act of 1990, 104 Stat. 5114, reads:

"Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Section 313(c) states that the "amendments made by this section shall apply with respect to causes of action accruing on or after the date [December 1, 1990,] of the enactment of this Act." This new statute obviously has no application in the present litigation.

143, 157–170 (1987) (SCALIA, J., concurring in judgment), see also *Reed* v. *United Transportation Union*, 488 U. S. 319, 334 (1989) (SCALIA, J., concurring in judgment).

The present case presents a distinctive difficulty because it involves one of those so-called "implied" causes of action that, for several decades, this Court was prone to discover in—or, more accurately, create in reliance upon—federal legislation. See *Thompson* v. *Thompson*, 484 U. S. 174, 190 (1988) (SCALIA, J., concurring in judgment). Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals. See *id.*, at 191–192; *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (Powell, J., dissenting). We have done so, however, and thus the question arises what statute of limitations applies to such a suit. Congress has not had the opportunity (since it did not itself create the cause of action) to consider whether it is content with the state limitations or would prefer to craft its own rule. That lack of opportunity is particularly apparent in the present case, since Congress *did* create special limitations periods for the Securities Exchange Act of 1934 causes of actions that it actually enacted. See 15 U. S. C. §§ 78p(b), 78i(e), 78r(c); see also § 77m.

When confronted with this situation, the only thing to be said for applying my ordinary (and the Court's pre-1983 traditional) rule is that the unintended and possibly irrational results will certainly deter judicial invention of causes of action. That is not an unworthy goal, but to pursue it in that fashion would be highly unjust to those who must litigate past inventions. An alternative approach would be to say that since we "implied" the cause of action we ought to "imply" an appropriate statute of limitations as well. That is just enough, but too lawless to be imagined. It seems to me the most responsible approach, where the enactment that has been the occasion for our creation of a cause of action contains a limitations period for an analogous cause of action, is to use

that. We are imagining here. And I agree with the Court that "[w]e can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ante*, at 359.

I join the judgment of the Court, and all except Part II–A of the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

In my opinion, the Court has undertaken a lawmaking task that should properly be performed by Congress. Starting from the premise that the federal cause of action for violating § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b), was created out of whole cloth by the Judiciary, it concludes that the Judiciary must also have the authority to fashion the time limitations applicable to such an action. A page from the history of § 10(b) litigation will explain why both the premise and the conclusion are flawed.

The private cause of action for violating § 10(b) was first recognized in *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946). In recognizing this implied right of action, Judge Kirkpatrick merely applied what was then a well-settled rule of federal law. As was true during most of our history, the federal courts then presumed that a statute enacted to benefit a special class provided a remedy for those members injured by violations of the statute. See *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40 (1916).[1] Judge Kirkpatrick did not make "new law" when he applied

[1] In *Texas & Pacific R. Co.* v. *Rigsby*, a unanimous Court stated this presumption:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law. . . . This is but an application of the maxim, *Ubi jus ibi remedium*." 241 U. S., at 39–40.

this presumption to a federal statute enacted for the benefit of investors in securities that are traded in interstate commerce.

During the ensuing four decades of administering § 10(b) litigation, the federal courts also applied settled law when they looked to state law to find the rules governing the timeliness of claims. See *DelCostello* v. *Teamsters*, 462 U. S. 151, 172–173 (1983) (STEVENS, J., dissenting).[2] It was not until 1988 that a federal court decided that it would be better policy to have a uniform federal statute of limitations apply to claims of this kind. See *In re Data Access Systems Securities Litigation*, 843 F. 2d 1537 (CA3). I agree that such a uniform limitations rule is preferable to the often chaotic traditional approach of looking to the analogous state limitation. I believe, however, that Congress, rather than the Federal Judiciary, has the responsibility for making the policy determinations that are required in rejecting a rule selected under the doctrine of state borrowing, long applied in § 10(b) cases, and choosing a new limitations period and its associated tolling rules.[3] When a legislature enacts a new rule of law governing the timeliness of legal action, it can—and usually does—specify the effective date of the rule and determine the extent to which it shall apply to pending claims. See, *e. g.*, 104 Stat. 5114, quoted *ante*, at 364, n. 10. When the Court ventures into this lawmaking arena, however, it inevitably raises questions concerning the retroactivity of its new rule that are difficult and arguably inconsistent with the neutral,

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[2] Federal judges have 'borrowed' state statutes of limitations because they were directed to do so by the Congress of the United States under the Rules of Decision Act, 28 U. S. C. § 1652. *DelCostello* v. *Teamsters*, 462 U. S., at 172–173 (STEVENS, J., dissenting); see also *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 157–165 (1987) (SCALIA, J., concurring in judgment).

[3] Congress is perfectly capable of making these decisions. When confronted with the same need for uniformity in treble-damages litigation under the antitrust laws in 1955, it enacted § 5 of the Clayton Act to provide a 4-year period of limitations. See 69 Stat. 283, 15 U. S. C. § 15b.

nonpolicymaking role of the judge. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *In re Data Access*, 843 F. 2d, at 1551 (Seitz, J., dissenting).

The Court's rejection of the traditional rule of applying a state limitations period when the federal statute is silent is not justified by this Court's prior cases. Despite the majority's recognition of the traditional rule, *ante*, at 355, it effectively repudiates it by holding that "[o]nly where no analogous counterpart [within the statute] is available should a court then proceed to apply state-borrowing principles." *Ante*, at 359. The Court's principal justification for this departure is that it took similar action in *DelCostello*, *supra*. I registered my dissent in that case for reasons similar to those I express today. In that case there was nothing in the statute to lead me to believe that Congress intended to depart from our settled practice of looking to analogous state limitations. *Id.*, at 171–173. Likewise in this case, I can find nothing in the Securities Exchange Act of 1934 that leads me to believe that Congress intended us to depart from our traditional rule and overrule four decades of established law.

The other case on which the Court primarily relies, *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143 (1987), is distinguishable from this case. *Agency Holding* did not involve a change in a rule of law that had been settled for 40 years. Furthermore, in that case, the Court found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy. The remedy in the Clayton Act was subject to a 4-year statute of limitations, and the Court reasonably inferred that Congress wanted the same limitations period to apply to both statutes. The Court has not found a similar intent to pattern § 10 of the Securities Exchange Act of 1934 after those sections subject to a 1-and-3-year limitation. See *ante*, at 359–361.

The policy choices that the Court makes today may well be wise—even though they are at odds with the recommendation of the Executive Branch—but that is not a sufficient

justification for making a change in what was well-settled law during the years between 1946 and 1988 governing the timeliness of action impliedly authorized by a federal statute. This Court has recognized that a rule of statutory construction that has been consistently applied for several decades acquires a clarity that "is simply beyond peradventure." *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 380 (1983). I believe that the Court should continue to observe that principle in this case. The Court's occasional departure from that principle does not justify today's refusal to comply with the Rules of Decision Act. See, *e. g.*, *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 268 (1987) (STEVENS, J., dissenting). Accordingly, I respectfully dissent.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY joins, dissenting.

I agree that predictability and judicial economy counsel the adoption of a uniform federal statute of limitations for actions brought under § 10(b) and Rule 10b–5. For the reasons stated by JUSTICE KENNEDY, however, I believe we should adopt the 1-year-from-discovery-rule, but not the 3-year period of repose. I write separately only to express my disagreement with the Court's decision in Part IV to apply the new limitations period *in this case*. In holding that respondents' suit is time barred under a limitations period that did not exist before today, the Court departs drastically from our established practice and inflicts an injustice on the respondents. The Court declines to explain its unprecedented decision, or even to acknowledge its unusual character.

Respondents, plaintiffs below, filed this action in Federal District Court in 1986. Everyone agrees that, at that time, their claims were governed by the *state* statute of limitations for the most analogous state cause of action. This was mandated by a solid wall of binding Ninth Circuit authority dat-

ing back more than 30 years.[1] See *ante*, at 353. The case proceeded in the District Court and the Court of Appeals for almost four years. During that time, the law never changed; the governing limitations period remained the analogous *state* statute of limitations.[2] Notwithstanding respondents' entirely proper reliance on this limitations period, the Court now holds that their suit must be dismissed as untimely because respondents did not comply with a *federal* limitations period announced for the first time today—4½ years after the suit was filed. Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future.

One might get the impression from the Court's matter-of-fact handling of the retroactivity issue that this is our standard practice. Part IV of the Court's opinion comprises, after all, only two sentences: the first sentence sets out the 1-and-3-year rule; the second states that respondents' complaint is untimely for failure to comply with the rule. Surely, one might think, if the Court were doing anything out of the ordinary, it would comment on the fact.

Apparently not. This Court has, on several occasions, announced new statutes of limitations. Until today, however, the Court had *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent. Our practice has been instead to evaluate the case at hand by the old limitations period, reserving the new rule for application in future cases.

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[1] See *Robuck* v. *Dean Witter & Co.*, 649 F. 2d 641, 644 (1980); *Williams* v. *Sinclair*, 529 F. 2d 1383, 1387 (1976); *Douglass* v. *Glenn E. Hinton Investments, Inc.*, 440 F. 2d 912, 914–916 (1971); *Hecht* v. *Harris, Upham & Co.*, 430 F. 2d 1202, 1210 (1970); *Royal Air Properties, Inc.* v. *Smith*, 312 F. 2d 210, 214 (1962); *Fratt* v. *Robinson*, 203 F. 2d 627, 634–635 (1953).

[2] See *Davis* v. *Birr, Wilson & Co.*, 839 F. 2d 1369, 1369–1370 (CA9 1988); *Volk* v. *D. A. Davidson & Co.*, 816 F. 2d 1406, 1411–1412 (CA9 1987); *Semegen* v. *Weidner*, 780 F. 2d 727, 733 (CA9 1985); *SEC* v. *Seaboard Corp.*, 677 F. 2d 1301, 1308–1309 (CA9 1982).

A prime example is *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). The issue in that case was whether state or federal law governed the timeliness of an action brought under a particular federal statute. At the time the lawsuit was initiated, the rule was that federal law governed. This Court changed the rule, holding that the timeliness of an action should be governed by state law. The Court declined to apply the state statute of limitations *in that case*, however, because the action had been filed long before the new rule was announced. The Court recognized, sensibly, that its decision overruled a long line of Court of Appeals' decisions on which the respondent had properly relied, *id.*, at 107; that retroactive application would be inconsistent with the purpose of using state statutes of limitations, *id.*, at 107–108; and that it would be highly inequitable to pretend that the respondent had "'slept on his rights'" when, in reality, he had complied fully with the law as it existed and could not have foreseen that the law would change. *Id.*, at 108.

We followed precisely the same course several years later in *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987). We declined to apply a decision specifying the applicable statute of limitations retroactively because doing so would bar a suit that, under controlling Circuit precedent, had been filed in a timely manner. We relied expressly on the analysis of *Chevron Oil*, holding that a decision identifying a new limitations period should be applied only prospectively where it overrules clearly established Circuit precedent, where retroactive application would be inconsistent with the purpose of the underlying statute, and where doing so would be "manifestly inequitable." *Saint Francis College*, *supra*, at 608–609.

Chevron Oil and *Saint Francis College* are based on fundamental notions of justified reliance and due process. They reflect a straightforward application of an earlier line of cases holding that it violates due process to apply a limitations period retroactively and thereby deprive a party arbitrarily of a

right to be heard in court. See *Wilson* v. *Iseminger*, 185 U. S. 55, 62 (1902); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 681–682 (1930). Not surprisingly, then, the Court's decision in *Chevron Oil* and *Saint Francis College* not to apply new limitations periods retroactively generated no disagreement among Members of the Court: The opinion in *Chevron Oil* was joined by all but one Justice, who did not reach the retroactivity question; *Saint Francis College* was unanimous.

Only last Term, eight Justices reaffirmed the commonsense rule that decisions specifying the applicable statute of limitations apply only prospectively. See *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990). The question presented in *American Trucking* was whether an earlier decision of the Court—striking down as unconstitutional a particular state highway tax scheme—would apply retroactively. In the course of explaining why the ruling would not apply retroactively, the plurality opinion relied heavily on our statute of limitations cases:

> "When considering the retroactive applicability of decisions newly defining statutes of limitations, the Court has focused on the action taken in reliance on the old limitation period—usually, the filing of an action. Where a litigant filed a claim that would have been timely under the prior limitation period, the Court has held that the new statute of limitation would not bar his suit." *Id.*, at 193–194.

Four other Justices, while disagreeing that *Chevron Oil*'s retroactivity analysis should apply in other contexts, reaffirmed its application to statutes of limitations. The dissenting Justices stated explicitly that it would be "most inequitable to [hold] that [a] plaintiff ha[s] '"slept on his rights"' during a period in which neither he nor the defendant could have known the time limitation that applied to the case." *American Trucking*, *supra*, at 220 (STEVENS, J., dissenting), quoting *Chevron Oil*, *supra*, at 108.

After *American Trucking*, the continued vitality of *Chevron Oil* with respect to statutes of limitations is—or should be—irrefutable; nothing in *James B. Beam Distilling Co.* v. *Georgia*, *post*, p. 529, alters this fact. The present case is indistinguishable from *Chevron Oil* and retroactive application should therefore be denied. All three *Chevron Oil* factors are met. First, in adopting a federal statute of limitations, the Court overrules clearly established Circuit precedent; the Court admits as much. *Ante*, at 353. Second, the Court explains that "the federal interes[t] in predictability" demands a uniform standard. *Ante*, at 357. I agree, but surely predictability cannot favor applying retroactively a limitations period that the respondents could not possibly have foreseen. Third, the inequitable results are obvious. After spending 4½ years in court and tens of thousands of dollars in attorney's fees, respondents' suit is dismissed for failure to comply with a limitations period that did not exist until today.

Earlier this Term, the Court observed that "the doctrine of *stare decisis* serves profoundly important purposes in our legal system." *California* v. *Acevedo*, 500 U. S. 565, 579 (1991). If that is so, it is difficult to understand the Court's decision today to apply retroactively a brand new statute of limitations. Part IV of the Court's opinion, without discussing the relevant cases or even acknowledging the issue, declines to follow the precedent established in *Chevron Oil*, *Saint Francis College*, and *American Trucking*, not to mention *Wilson* and *Brinkerhoff-Faris*.

The Court's cursory treatment of the retroactivity question cannot be an oversight. The parties briefed the issue in this Court. See Brief for Respondents 45–48; Reply Brief for Petitioner 18–20. In addition, the United States, filing an *amicus curiae* brief on behalf of the Securities and Exchange Commission, addressed the issue explicitly, urging the Court to remand so that the lower court may address the retroactivity question in the first instance. Nevertheless,

the Court, for reasons unknown and unexplained, chooses to ignore the issue, thereby visiting unprecedented unfairness on respondents.

Even if I agreed with the limitations period adopted by the Court, I would dissent from Part IV of the Court's opinion. Our prior cases dictate that the federal statute of limitations announced today should not be applied retroactively. I would remand so that the lower courts may determine in the first instance the timeliness of respondents' lawsuit.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, dissenting.

I am in full agreement with the Court's determination that, under our precedents, a uniform federal statute of limitations is appropriate for private actions brought under § 10(b) of the Securities Exchange Act of 1934 and that we should adopt as a limitations period the 1-year-from-discovery rule Congress employed in various provisions of the 1934 Act. I must note my disagreement, however, with the Court's simultaneous adoption of the 3-year period of repose Congress also employed in a number of the 1934 Act's provisions. This absolute time bar on private § 10(b) suits conflicts with traditional limitations periods for fraud-based actions, frustrates the usefulness of § 10(b) in protecting defrauded investors, and imposes severe practical limitations on a federal implied cause of action that has become an essential component of the protection the law gives to investors who have been injured by unlawful practices.

As the Court recognizes, in the absence of an express limitations period in a federal statute, courts as a general matter should apply the most analogous state limitations period or, in rare cases, no limitations period at all. This rule does not apply, however, "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *DelCostello* v.

Teamsters, 462 U. S. 151, 172 (1983); see *Reed* v. *United Transportation Union*, 488 U. S. 319, 324 (1989). Applying this principle, the Court looks first to the express private rights of action in the 1934 Act itself to find what it believes are the appropriate limitations periods to apply here. One cannot fault the Court's mode of analysis; given that § 10(b) actions are implied under the 1934 Act, it makes sense for us to look to the limitations periods Congress established under the Act. See *DelCostello*, *supra*, at 171; *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 68, n. 4 (1981). That does not relieve us, however, of our obligation to reject a limitations rule that would "frustrate or significantly interfere with federal policies." *Reed*, 488 U. S., at 327. When determining the appropriate statute of limitations to apply, we must give careful consideration to the policies underlying a federal statute and to the practical difficulties aggrieved parties may have in establishing a violation. *Ibid.*; *Wilson* v. *Garcia*, 471 U. S. 261, 268 (1985).

This is not a case where the Court identifies a specific statute and follows each of its terms. As the Court is careful to note, the 1934 Act does not provide a single limitations period for all private actions brought under its express provisions. Rather, the Act makes three separate and distinct references to statutes of limitations. The Court rejects outright one of these references, a 2-year statute of repose for actions brought under § 16 of the 1934 Act, 15 U. S. C. § 78p(b), and purports to follow the other two. §§ 78i(e), 78r(c). The latter two references employ 1-year, 3-year schemes similar to one the Court establishes here, but each has its own unique wording. The Court does not identify any reasons for finding one to be controlling, so it is unnecessary to engage in close grammatical construction to separate the 1-year discovery period from the 3-year statute of repose.

It is of even greater importance to note that both of the statutes in question relate to express causes of action which in their purpose and underlying rationale differ from causes

of action implied under § 10(b). The limitations statutes to which the Court refers apply to strict liability violations or, in the case of § 78i(e), to a rarely used remedy under § 9 of the 1934 Act. See L. Loss, Fundamentals of Securities Regulation 920 (2d ed. 1988). Neither relates to a cause of action of the scope and coverage of an implied action under § 10(b). Nor does either rest on the common-law fraud model underlying most § 10(b) actions.

Section 10(b) provides investors with significant protections from fraudulent practices in the securities markets. Intended as a comprehensive antifraud provision operating even when more specific laws have no application, § 10(b) makes it unlawful to employ in connection with the purchase or sale of any security "any manipulative or deceptive device or contrivance" in violation of the Securities and Exchange Commission's rules. 15 U. S. C. § 78j. Although Congress gave the Commission the primary role in enforcing this section, private § 10(b) suits constitute "an essential tool for enforcement of the 1934 Act's requirements," *Basic Inc.* v. *Levinson*, 485 U. S. 224, 231 (1988), and are "'a necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299, 310 (1985) (quoting *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964)). We have made it clear that rules facilitating § 10(b) litigation "suppor[t] the congressional policy embodied in the 1934 Act" of combating all forms of securities fraud. *Basic*, *supra*, at 245.

The practical and legal obstacles to bringing a private § 10(b) action are significant. Once federal jurisdiction is established, a § 10(b) plaintiff must prove elements that are similar to those in actions for common-law fraud. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375 (1983). Each requires proof of a false or misleading statement or material omission, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462 (1977), reliance thereon, *Basic*, 485 U. S., at 243; cf. *id.*, at 245 (reliance presumed in § 10(b) cases proving "fraud-on-the-

market"), damages caused by the wrongdoing, *Randall* v. *Loftsgaarden*, 478 U. S. 647, 663 (1986), and scienter on the part of the defendant, *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976). Given the complexity of modern securities markets, these facts may be difficult to prove.

The real burden on most investors, however, is the initial matter of discovering whether a violation of the securities laws occurred at all. This is particularly the case for victims of the classic fraudlike case that often arises under § 10(b). "[C]oncealment is inherent in most securities fraud cases." American Bar Association, Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Lawyer 645, 654 (1985). The most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action under the 1934 Act. Ponzi schemes, for example, can maintain the illusion of a profit-making enterprise for years, and sophisticated investors may not be able to discover the fraud until long after its perpetration. *Id.*, at 656. Indeed, in *Ernst & Ernst*, the alleged fraudulent scheme had gone undetected for over 25 years before it was revealed in a stockbroker's suicide note. 425 U. S., at 189.

The practicalities of litigation, indeed the simple facts of business life, are such that the rule adopted today will "thwart the legislative purpose of creating an effective remedy" for victims of securities fraud. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 154 (1987). By adopting a 3-year period of repose, the Court makes a § 10(b) action all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred. In so doing, the Court also turns its back on the almost uniform rule rejecting short periods of repose for fraud-based actions. In the vast majority of States, the only limitations periods on fraud actions run from the time of a victim's discovery of the fraud. Shapiro & Blauner, Securities Litigation in the Aftermath of *In Re Data Access Securities*

Litigation, 24 New England L. Rev. 537, 549–550 (1989). Only a small minority of States constrain fraud actions with absolute periods of repose, and those that do typically permit actions to be brought within at least five years. See, *e. g.*, Fla. Stat. § 95.11(4)(e) (1991) (5-year period of repose); Ky. Rev. Stat. Ann. § 413.120(11) (Michie 1990) (10-year period of repose); Mo. Rev. Stat. § 516.120(5) (1986) (10-year period of repose). Congress itself has recognized the importance of granting victims of fraud a reasonable time to discover the facts underlying the fraud and to prepare a case against its perpetrators. See, *e. g.*, Interstate Land Sales Full Disclosure Act, 15 U. S. C. § 1711(a)(2) (action may be brought within three years from discovery of violation); Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U. S. C. § 78t–1(b)(4) (action may be brought within five years of the violation). The Court, however, does not.

A reasonable statute of repose, even as applied against fraud-based actions, is not without its merits. It may sometimes be easier to determine when a fraud occurred than when it should have been discovered. But more important, limitations periods in general promote important considerations of fairness. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson*, 471 U. S., at 271. Notwithstanding these considerations, my view is that a 3-year absolute time bar is inconsistent with the practical realities of § 10(b) litigation and the congressional policies underlying that remedy. The 1-year-from-discovery rule is sufficient to ensure a fair balance between protecting the legitimate interests of aggrieved investors, yet preventing stale claims. In the extreme case, moreover, when the period between the alleged fraud and its discovery is of extraordinary length, courts may apply equitable principles such as laches should it be unfair to permit the claim. See *DelCostello*, 462 U. S., at 162; *Holmberg* v. *Armbrecht*,

327 U. S. 392 (1946). A 3-year absolute bar on § 10(b) actions simply tips the scale too far in favor of wrongdoers.

The Court's decision today forecloses any means of recovery for a defrauded investor whose only mistake was not discovering a concealed fraud within an unforgiving period of repose. As fraud in the securities markets remains a serious national concern, Congress may decide that the rule announced by the Court today should be corrected. But even if prompt congressional action is taken, it will not avail defrauded investors caught by the Court's new and unforgiving rule, here applied on a retroactive basis to a pending action.

With respect, I dissent and would remand with instructions that a § 10(b) action may be brought at any time within one year after an investor discovered or should have discovered a violation. In any event, I would permit the litigants in this case to rely upon settled Ninth Circuit precedent as setting the applicable limitations period in this case, and join JUSTICE O'CONNOR's dissenting opinion in full.

CHISOM ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–757. Argued April 22, 1991—Decided June 20, 1991*

The Louisiana Supreme Court consists of seven members, two of whom are elected at large from one multimember district, with the remainder elected from single-member districts. Petitioners in No. 90–757 represent a class of black registered voters in Orleans Parish, which is the largest of the four parishes in the multimember district and contains about half of the district's registered voters. Although more than one-half of Orleans Parish's registered voters are black, over three-fourths of the voters in the other three parishes are white. Petitioners filed an action in the District Court against respondents, the Governor and state officials, alleging that the method of electing justices from their district impermissibly dilutes minority voting strength in violation of, *inter alia*, § 2 of the Voting Rights Act of 1965. As amended in 1982, § 2(a) prohibits the imposition of a voting qualification or prerequisite or standard, practice, or procedure that "*results* in a denial or abridgement of the right . . . to vote on account of race or color," and § 2(b) states that the test for determining the legality of such a practice is whether, "based on the totality of circumstances," minority voters "have less opportunity than other members of the electorate to participate in the political process *and* to elect *representatives* of their choice." (Emphasis added.) The United States, petitioner in No. 90–1032, subsequently intervened to support petitioners' claims, and the District Court ultimately ruled against petitioners on the merits. However, the Court of Appeals finally remanded the case with directions to dismiss the complaint in light of its earlier en banc decision in *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F. 2d 620 *(LULAC)*, that judicial elections are not covered under § 2 of the Act as amended. There, the court distinguished between claims involving the opportunity to participate in the political process and claims involving the opportunity to elect representatives of minority voters' choice, holding that § 2 applied to judicial elections with respect to claims in the first category, but that

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*Together with No. 90–1032, *United States* v. *Roemer, Governor of Louisiana, et al.*, also on certiorari to the same court.

because judges are not "representatives," the use of that term excludes judicial elections from claims in the second category.

Held: Judicial elections are covered by § 2 as amended. Pp. 391–404.

(a) As originally enacted, § 2 was coextensive with the Fifteenth Amendment, and it is undisputed that it applied to judicial elections. The 1982 amendment expanded § 2's protection by adopting a results test, thus eliminating the requirement that proof of discriminatory intent is necessary to prove a § 2 violation, and by adding § 2(b), which provides guidance about how to apply that test. Had Congress also intended to exclude judicial elections, it would have made its intent explicit in the statute or identified or mentioned it in the amendment's unusually extensive legislative history. Pp. 391–396.

(b) The results test is applicable to all § 2 claims. The statutory text and this Court's cases foreclose the *LULAC* majority's reading of § 2. If the word "representatives" placed a limit on § 2's coverage for judicial elections, it would exclude all claims involving such elections, for the statute requires that all claims must allege an abridgment of the opportunity both to participate in the political process *and* to elect representatives of one's choice. Thus, rather than creating two separate and distinct rights, the statute identifies two inextricably linked elements of a plaintiff's burden of proof. See, *e. g.*, *White* v. *Regester*, 412 U. S. 755. Pp. 396–398.

(c) The word "representatives" describes the winners of representative, popular elections, including elected judges. Although the *LULAC* majority correctly noted that judges need not be elected, when they are, it seems both reasonable and realistic to characterize the winners as representatives of the districts in which they reside and run. The legislative history provides no support for the arguments that the term "representatives" includes only legislative and executive officials or that Congress would have chosen the word "candidates" had it intended to apply the vote dilution prohibition to judicial elections. Pp. 398–401.

(d) Adopting respondents' view of coverage would lead to the anomalous result that a State covered by § 5 of the Act would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, *Clark* v. *Roemer*, 500 U. S. 646, but a similarly discriminatory system already in place could not be challenged under § 2. Pp. 401–402.

(e) That the one-person, one-vote rule is inapplicable to judicial elections, *Wells* v. *Edwards*, 409 U. S. 1095, does not mean that judicial elections are entirely immune from vote dilution claims. *Wells* rejected a constitutional claim and, thus, has no relevance to a correct interpretation of this statute, which was enacted to provide additional pro-

tection for voting rights not adequately protected by the Constitution itself. Cf. *City of Rome* v. *United States*, 446 U. S. 156, 172–183. Pp. 402–403.

917 F. 2d 187, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 404. KENNEDY, J., filed a dissenting opinion, *post*, p. 418.

Solicitor General Starr argued the cause for the United States in No. 90–1032. With him on the briefs were *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Clegg*, *Paul J. Larkin, Jr.*, *Jessica Dunsay Silver*, and *Mark L. Gross*. *Pamela S. Karlan* argued the cause for petitioners in No. 90–757. With her on the briefs were *Julius LeVonne Chambers*, *Charles Stephen Ralston*, *Dayna L. Cunningham*, *Ronald L. Wilson*, *C. Lani Guinier*, *William P. Quigley*, *Roy Rodney, Jr.*

Robert G. Pugh argued the cause for respondents in both cases. With him on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, *M. Truman Woodward, Jr.*, *Moise W. Dennery*, and *A. R. Christovich*, Special Assistant Attorneys General, and *Robert G. Pugh, Jr.*†

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†Briefs of *amici curiae* urging reversal were filed for the Lawyers' Committee for Civil Rights Under Law et al. by *Frank R. Parker*, *Robert B. McDuff*, *Brenda Wright*, *Robert F. Mullen*, *David S. Tatel*, *Norman Redlich*, *Laughlin McDonald*, *Neil Bradley*, *Kathleen L. Wilde*, *Mary Wyckoff*, *Samuel Rabinove*, *Richard T. Foltin*, *Antonia Hernandez*, and *Judith Sanders-Castro;* for Supreme Court Justice for Orleans, Inc., by *M. David Gelfand*, *Terry E. Allbritton*, *John S. Keller*, and *Ira J. Middleberg;* and for Darleen M. Jacobs by *Ms. Jacobs*, *pro se*, and *Brian C. Beckwith*.

Briefs of *amici curiae* urging affirmance were filed for the State of Georgia by *Michael J. Bowers*, Attorney General, *Carol Atha Cosgrove*, Assistant Attorney General, and *David F. Walbert;* for the Pacific Legal Founda-

JUSTICE STEVENS delivered the opinion of the Court.

The preamble to the Voting Rights Act of 1965 establishes that the central purpose of the Act is "[t]o enforce the fifteenth amendment to the Constitution of the United States."[1] The Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15, § 1.

In 1982, Congress amended § 2 of the Voting Rights Act[2] to make clear that certain practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden even though the absence of proof of discriminatory intent

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tion by *Ronald A. Zumbrun* and *Anthony T. Caso;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.*

Edwin F. Hendricks filed a brief for the American Judicature Society as *amicus curiae.*

[1] Pub. L. 89–110, 79 Stat. 437, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. I).

[2] Section 2 of the Voting Rights Act of 1965, as amended, now reads:

"SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134. Section 2 has been codified at 42 U. S. C. § 1973.

protects them from constitutional challenge. The question presented by these cases is whether this "results test" protects the right to vote in state judicial elections. We hold that the coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982 and that judicial elections are embraced within that coverage.

I

Petitioners in No. 90–757 represent a class of approximately 135,000 black registered voters in Orleans Parish, Louisiana. App. 6–7, 13. They brought this action against the Governor and other state officials (respondents) to challenge the method of electing justices of the Louisiana Supreme Court from the New Orleans area. The United States, petitioner in No. 90–1032, intervened to support the claims advanced by the plaintiff class.

The Louisiana Supreme Court consists of seven justices,[3] five of whom are elected from five single-member Supreme Court Districts, and two of whom are elected from one multimember Supreme Court District.[4] Each of the seven members of the court must be a resident of the district from which he or she is elected and must have resided there for at least two years prior to election. App. to Pet. for Cert. 7a. Each of the justices on the Louisiana Supreme Court serves a term of 10 years.[5] The one multimember district, the First Supreme Court District, consists of the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson.[6] Orleans Parish contains about half of the population of the First Supreme Court District and about half of the registered voters in that district. *Chisom* v. *Edwards*, 839 F. 2d 1056, 1057 (CA5 1988). More than one-half of the registered voters of Orleans Parish are black, whereas more than three-fourths of

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[3] La. Const., Art. 5, § 3; La. Rev. Stat. Ann. § 13:101 (West 1983).

[4] La. Const., Art. 5, § 22(A); La. Rev. Stat. Ann. § 13:101 (West 1983).

[5] La. Const., Art. 5, § 3.

[6] La. Const., Art. 5, § 4; La. Rev. Stat. Ann. § 13:101 (West 1983).

the registered voters in the other three parishes are white. App. 8.

Petitioners allege that "the present method of electing two Justices to the Louisiana Supreme Court at-large from the New Orleans area impermissibly dilutes minority voting strength" in violation of § 2 of the Voting Rights Act. *Id.*, at 9. Furthermore, petitioners claimed in the courts below that the current electoral system within the First Supreme Court District violates the Fourteenth and Fifteenth Amendments of the Federal Constitution because the purpose and effect of this election practice "is to dilute, minimize, and cancel the voting strength" of black voters in Orleans Parish. *Ibid.* Petitioners seek a remedy that would divide the First District into two districts, one for Orleans Parish and the second for the other three parishes. If this remedy were adopted, the seven members of the Louisiana Supreme Court would each represent a separate single-member judicial district, and each of the two new districts would have approximately the same population. *Id.*, at 8. According to petitioners, the new Orleans Parish district would also have a majority black population and majority black voter registration. *Id.*, at 8, 47.

The District Court granted respondents' motion to dismiss the complaint. *Chisom* v. *Edwards*, 659 F. Supp. 183 (ED La. 1987). It held that the constitutional claims were insufficient because the complaint did not adequately allege a specific intent to discriminate. *Id.*, at 189. With respect to the statutory claim, the court held that § 2 is not violated unless there is an abridgment of minority voters' opportunity "to elect representatives of their choice." *Id.*, at 186–187. The court concluded that because judges are not "representatives," judicial elections are not covered by § 2. *Id.*, at 187.

The Court of Appeals for the Fifth Circuit reversed. *Chisom* v. *Edwards*, 839 F. 2d 1056, cert. denied *sub nom. Roemer* v. *Chisom*, 488 U. S. 955 (1988). Before beginning its analysis, the court remarked that "[i]t is particularly sig-

nificant that no black person has ever been elected to the Louisiana Supreme Court, either from the First Supreme Court District or from any one of the other five judicial districts." 839 F. 2d, at 1058. After agreeing with the recently announced opinion in *Mallory* v. *Eyrich*, 839 F. 2d 275 (CA6 1988), it noted that the broad definition of the terms "voting" and "vote" in § 14(c)(1) of the original Act expressly included judicial elections within the coverage of § 2.[7] It also recognized Congress' explicit intent to expand the coverage of § 2 by enacting the 1982 amendment. 839 F. 2d, at 1061.[8] Consistent with Congress' efforts to broaden coverage under the Act, the court rejected the State's contention that the term "representatives" in the 1982 amendment was used as a word of limitation. *Id.*, at 1063 (describing State's

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[7] "Section 14(c)(1), which defines 'voting' and 'vote' for purposes of the Act, sets forth the types of election practices and elections which are encompassed within the regulatory sphere of the Act. Section 14(c)(1) states:

"The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." See 42 U. S. C. § 1973*l*(c)(1).

"Clearly, judges are 'candidates for public or party office' elected in a primary, special, or general election; therefore, section 2, by its express terms, extends to state judicial elections. This truly is the only construction consistent with the plain language of the Act." 839 F. 2d, at 1059–1060.

[8] "It is difficult, if not impossible, for this Court to conceive of Congress, in an express attempt to expand the coverage of the Voting Rights Act, to have in fact amended the Act in a manner affording minorities less protection from racial discrimination than that provided by the Constitution. . . . [S]ection 2 necessarily embraces judicial elections within its scope. Any other construction of section 2 would be wholly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending section 2; that is, to expand the protection of the Act." *Id.*, at 1061.

position as "untenable"). Instead, the court concluded that representative "'denotes anyone selected or chosen by popular election from among a field of candidates to fill an office, including judges.'" *Ibid.* (quoting *Martin* v. *Allain*, 658 F. Supp. 1183, 1200 (SD Miss. 1987)). The court buttressed its interpretation by noting that "section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future." 839 F. 2d, at 1064. It also gleaned support for its construction of § 2 from the fact that the Attorney General had "consistently supported an expansive, not restrictive, construction of the Act." *Ibid.* Finally, the court held that the constitutional allegations were sufficient to warrant a trial, and reinstated all claims. *Id.*, at 1065.[9]

After the case was remanded to the District Court, the United States filed a complaint in intervention in which it alleged that the use of a multimember district to elect two members of the Louisiana Supreme Court is a "standard, practice or procedure" that "results in a denial or abridgment of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act." App. 48. After a nonjury trial, however, the District Court concluded that the evidence did not establish a violation of § 2 under the standards set forth in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986).

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[9] After remand, but before trial, plaintiffs (here petitioners) moved for a preliminary injunction, enjoining the October 1, 1988, election for one of the two Louisiana Supreme Court seats from the First Supreme Court District. The District Court granted plaintiffs' motion, having found that they satisfied the four elements required for injunctive relief. *Chisom* v. *Edwards*, 690 F. Supp. 1524, 1531 (ED La. 1988). The Court of Appeals, however, vacated the preliminary injunction and ordered that the election proceed as scheduled. *Chisom* v. *Roemer*, 853 F. 2d 1186, 1192 (CA5 1988). It reasoned that if the election were enjoined, the resulting uncertainty would have a deleterious effect on the Louisiana Supreme Court and the administration of justice that would outweigh any potential harm plaintiffs might suffer if the election went forward. *Id.*, at 1190–1192.

App. to Pet. for Cert. 62a. The District Court also dismissed the constitutional claims. *Id.*, at 63a–64a. Petitioners and the United States appealed. While their appeal was pending, the Fifth Circuit, sitting en banc in another case, held that judicial elections were not covered under § 2 of the Act as amended. *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F. 2d 620 (1990) (hereinafter *LULAC*).

The majority in *LULAC* concluded that Congress' use of the word "representatives" in the phrase "to elect representatives of their choice" in § 2(b) of the Act indicated that Congress did not intend to authorize vote dilution claims in judicial elections. The en banc panel reached this conclusion after considering (1) the "precise language" of the amendment, *id.*, at 624; (2) the character of the judicial office, with special emphasis on "the cardinal reason that judges need not be elected at all," *id.*, at 622; and (3) the fact that the one-person, one-vote rule had been held inapplicable to judicial elections before 1982, *id.*, at 626.

The precise language of § 2 on which the *LULAC* majority focused provides that a violation of § 2 is established if the members of a protected class

> "'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.*, at 625 (quoting 42 U. S. C. § 1973(b)).

Noting that this language protects both the "the broad and general opportunity to participate in the political process and the specific one to elect representatives," *LULAC*, 914 F. 2d, at 625, the court drew a distinction between claims involving tests or other devices that interfere with individual participation in an election, on the one hand, and claims of vote dilution that challenge impairment of a group's opportunity to elect representatives of their choice, on the other hand. The majority assumed that the amended § 2 would continue to apply to judicial elections with respect to claims in the first

category, see *ibid.*, but that the word "representatives" excludes judicial elections from claims in the second category, see *id.*, at 625–628.

In the majority's view, it was "factually false" to characterize judges as representatives because public opinion is "irrelevant to the judge's role," *id.*, at 622; "the judiciary serves no representative function whatever: the judge represents no one," *id.*, at 625. The majority concluded that judicial offices "are not 'representative' ones, and their occupants are not representatives." *Id.*, at 631. Thus, Congress would not have used the word "representatives," as it did in § 2(b) of the Act, if it intended that subsection to apply to vote dilution claims in judicial elections.

The majority also assumed that Congress was familiar with *Wells* v. *Edwards*, 347 F. Supp. 453 (MD La. 1972), summarily aff'd, 409 U. S. 1095 (1973), a reapportionment case in which the District Court held that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government." 347 F. Supp., at 454. The express reference in the Senate Report to the fact that the "'principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*, [377 U. S. 533 (1964)],'" *LULAC*, 914 F. 2d, at 629 (quoting S. Rep. No. 97–417, p. 19 (1982)), persuaded the majority that, in light of the case law holding that judges were not representatives in the context of one-person, one-vote reapportionment cases, see *LULAC*, 914 F. 2d, at 626 (citing cases), Congress would not have authorized vote dilution claims in judicial elections without making an express, unambiguous statement to that effect.

Following the en banc decision in *LULAC*, the Court of Appeals remanded this litigation to the District Court with directions to dismiss the complaint. 917 F. 2d 187 (1990) *(per curiam)*. It expressed no opinion on the strength of petitioners' evidentiary case. We granted certiorari, 498

U. S. 1060 (1991), and set the case for argument with *LULAC*, see *post*, p. 419.

II

Our decision today is limited in character, and thus, it is useful to begin by identifying certain matters that are not in dispute. No constitutional claims are before us.[10] Unlike *Wells* v. *Edwards*,[11] *White* v. *Regester*,[12] and *Mobile* v. *Bolden*,[13] this case presents us solely with a question of statutory construction. That question involves only the scope of the coverage of § 2 of the Voting Rights Act as amended in 1982. We therefore do not address any question concerning the elements that must be proved to establish a violation of the Act or the remedy that might be appropriate to redress a violation if proved.

It is also undisputed that § 2 applied to judicial elections prior to the 1982 amendment,[14] and that § 5 of the amended statute continues to apply to judicial elections, see *Clark* v. *Roemer*, 500 U. S. 646 (1991). Moreover, there is no question that the terms "standard, practice, or procedure" are broad enough to encompass the use of multimember districts to minimize a racial minority's ability to influence the outcome of an election covered by § 2.[15] The only matter in dis-

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[10] Petitioners did not seek review in this Court of the disposition of their constitutional claims. Brief for Petitioners in No. 90–757, p. 8, n. 2; Brief for United States 4, n. 2; Tr. of Oral Arg. 27.

[11] 409 U. S. 1095 (1973), aff'g 347 F. Supp. 453 (MD La. 1972) (whether election of State Supreme Court justices by district violated the Equal Protection Clause of the Fourteenth Amendment).

[12] 412 U. S. 755 (1973) (whether population differential among districts established a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment).

[13] 446 U. S. 55 (1980) (whether at-large system of municipal elections violated black voters' rights under the Fourteenth and Fifteenth Amendments).

[14] See Brief for Respondents 16; Tr. of Oral Arg. 42.

[15] In *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court held that a local Act redefining the boundaries of the city of Tuskegee, Alabama, vio-

pute is whether the test for determining the legality of such a practice, which was added to the statute in 1982, applies in judicial elections as well as in other elections.

III

The text of §2 of the Voting Rights Act as originally enacted read as follows:

> "SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437.

The terms "vote" and "voting" were defined elsewhere in the Act to include "all action necessary to make a vote effective *in any primary, special, or general election.*" §14(c)(1) of the Act, 79 Stat. 445 (emphasis added). The statute further defined vote and voting as "votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." *Ibid.*

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lated the Fifteenth Amendment. In his opinion for the Court, Justice Frankfurter wrote:

"The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.*, at 345.

"A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.*, at 347.

At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment. See H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965) (§ 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color"); see also S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). This Court took a similar view of § 2 in *Mobile* v. *Bolden*, 446 U. S. 55, 60–61 (1980). There, we recognized that the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment. *Ibid.* Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview. As Attorney General Katzenbach made clear during his testimony before the House, "[e]very election in which registered electors are permitted to vote would be covered" under § 2.[16]

The 1965 Act made it unlawful "to deny or abridge" the right to vote "on account of race or color." 79 Stat. 437. Congress amended § 2 in 1975[17] by expanding the original prohibition against discrimination "on account of race or color" to include non-English-speaking groups. It did this by replacing "race or color" with "race or color, or in contravention of the guarantees set forth in section 4(f)(2)" of the Act. 89 Stat. 402.[18] The 1982 amendment further expanded the protection afforded by § 2.

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[16] Hearings on H. R. 6400 and Other Proposals To Enforce the 15th Amendment to the Constitution of the United States before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 21 (1965).

[17] Pub. L. 94–73, 89 Stat. 400.

[18] The 1975 amendment added a new subsection to § 4 of the Act. The new subsection reads in part as follows:

Justice Stewart's opinion for the plurality in *Mobile* v. *Bolden*, *supra*, which held that there was no violation of either the Fifteenth Amendment or § 2 of the Voting Rights Act absent proof of intentional discrimination, served as the impetus for the 1982 amendment. One year after the decision in *Mobile*, Chairman Rodino of the House Judiciary Committee introduced a bill to extend the Voting Rights Act and its bilingual requirements, and to amend § 2 by striking out "to deny or abridge" and substituting "in a manner which *results* in a denial or abridgment of."[19] The "results" test proposed by Chairman Rodino was incorporated into S. 1992,[20] and ultimately into the 1982 amendment to § 2, and is now the focal point of this litigation.

"(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. . . .

"(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." 89 Stat. 401. See 42 U. S. C. §§ 1973b(f)(1), (2).

[19] H. R. 3112, 97th Cong., 1st Sess. (1981) (emphasis added).

[20] "The objectives of S. 1992, as amended, are as follows: (1) to extend the present coverage of the special provisions of the Voting Rights Act, Sections 4, 5, 6, 7 and 8; (2) to amend Section 4(a) of the Act to permit individual jurisdictions to meet a new, broadened standard for termination of coverage by those special provisions; (3) to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation of that section; (4) to extend the language-assistance provisions of the Act until 1992; and (5) to add a new section pertaining to voting assistance for voters who are blind, disabled, or illiterate.

. . . . . .

"S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in

Under the amended statute, proof of intent is no longer required to prove a §2 violation. Now plaintiffs can prevail under §2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race. Congress not only incorporated the results test in the paragraph that formerly constituted the entire §2, but also designated that paragraph as subsection (a) and added a new subsection (b) to make clear that an application of the results test requires an inquiry into "the totality of the circumstances."[21] The full text of §2 as amended in 1982 reads as follows:

> "SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on

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Mobile v. *Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White* v. *Regester*.

"This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. The new subsection also states that the section does not establish a right to proportional representation." S. Rep. No. 97–417, p. 2 (1982) (footnotes omitted).

[21] "The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the juridiction in question, results in minorities being denied equal access to the political process.

"The 'results' standard is meant to restore the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote." *Id.*, at 27 (footnote omitted).

See also *Thornburg* v. *Gingles*, 478 U. S. 30, 83–84 (1986) (O'CONNOR, J., concurring in judgment) ("Amended §2 is intended to codify the 'results' test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the 'intent' test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980))."

account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134.

The two purposes of the amendment are apparent from its text. Subsection (a) adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of the section. Subsection (b) provides guidance about how the results test is to be applied.

Respondents contend, and the *LULAC* majority agreed, that Congress' choice of the word "representatives" in the phrase "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"[22] in subsection (b) is evi-

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[22] The phrase is borrowed from JUSTICE WHITE's opinion for the Court in *White* v. *Regester*, 412 U. S. 755 (1973), which predates *Mobile* v. *Bolden*, 446 U. S. 55 (1980). Congress explained that its purpose in adding subsection 2(b) was to "embod[y] the test laid down by the Supreme Court in *White*." S. Rep. No. 97–417, at 27. In *White*, the Court said that the "plaintiffs' burden is to produce evidence . . . that [the minority group's] members had less opportunity than did other residents in the district to

dence of congressional intent to exclude vote dilution claims involving judicial elections from the coverage of § 2. We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.[23] Our conclusion is confirmed when we review the justifications offered by the *LULAC* majority and respondents in support of their construction of the statute; we address each of their main contentions in turn.

IV

The *LULAC* majority assumed that § 2 provides two distinct types of protection for minority voters—it protects their opportunity "to participate in the political process" and their opportunity "to elect representatives of their choice." See *LULAC*, 914 F. 2d, at 625. Although the majority interpreted "representatives" as a word of limitation, it assumed that the word eliminated judicial elections only from the latter protection, without affecting the former. *Id.*, at 625, 629. In other words, a standard, practice, or procedure in a judicial election, such as a limit on the times that polls are open, which has a disparate impact on black voters' opportunity to cast their ballots under § 2, may be challenged even if a different practice that merely affects their opportunity to elect representatives of their choice to a judicial office may

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participate in the political processes and to elect legislators of their choice." 412 U. S., at 766.

[23] Congress' silence in this regard can be likened to the dog that did not bark. See A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927). Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (REHNQUIST, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night"). See also *American Hospital Assn.* v. *NLRB*, 499 U. S. 606 (1991).

not. This reading of § 2, however, is foreclosed by the statutory text and by our prior cases.

Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of "*the right*" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U. S. C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.[24]

The statutory language is patterned after the language used by JUSTICE WHITE in his opinions for the Court in *White* v. *Regester*, 412 U. S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). See n. 22, *supra*. In both opinions, the Court identified the opportunity to participate and the opportunity to elect as inextricably linked. In *White* v. *Regester*, the Court described the connection as follows: "The plaintiffs' burden is to produce evidence . . . that its mem-

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[24] JUSTICE SCALIA argues that our literal reading of the word "and" leads to the conclusion that a small minority has no protection against infringements of its right "'to participate in the political process'" because it will always lack the numbers necessary "to elect its candidate," *post*, at 409. This argument, however, rests on the erroneous assumption that a small group of voters can never influence the outcome of an election.

bers had less opportunity than did other residents in the district to participate in the political processes *and* to elect legislators of their choice." 412 U. S., at 766 (emphasis added). And earlier, in *Whitcomb* v. *Chavis*, the Court described the plaintiffs' burden as entailing a showing that they "had less opportunity than did other . . . residents to participate in the political processes *and* to elect legislators of their choice." 403 U. S., at 149 (emphasis added).[25]

The results test mandated by the 1982 amendment is applicable to all claims arising under § 2. If the word "representatives" did place a limit on the coverage of the Act for judicial elections, it would exclude all claims involving such elections from the protection of § 2. For all such claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice. Even if the wisdom of Solomon would support the *LULAC* majority's proposal to preserve claims based on an interference with the right to vote in judicial elections while eschewing claims based on the opportunity to elect judges, we have no authority to divide a unitary claim created by Congress.

V

Both respondents and the *LULAC* majority place their principal reliance on Congress' use of the word "representatives" instead of "legislators" in the phrase "to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973. When Congress borrowed the phrase from *White* v. *Regester*, it replaced "legislators" with "representatives."[26] This substitution indicates, at the very

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[25] See also *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964) ("Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature").

[26] The word "representatives" rather than "legislators" was included in Senator Robert Dole's compromise, which was designed to assuage the fears of those Senators who viewed the House's version, H. R. 3112, as an invitation for proportional representation and electoral quotas. Senator

least, that Congress intended the amendment to cover more than legislative elections. Respondents argue, and the majority agreed, that the term "representatives" was used to extend § 2 coverage to executive officials, but not to judges. We think, however, that the better reading of the word "representatives" describes the winners of representative, popular elections. If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges.[27]

Respondents suggest that if Congress had intended to have the statute's prohibition against vote dilution apply to the election of judges, it would have used the word "candidates" instead of "representatives." Brief for Respondents 20, and n. 9. But that confuses the ordinary meaning of the words.

Dole explained that the compromise was intended both to embody the belief "that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent" and to "delineat[e] what legal standard should apply under the results test and clarif[y] that it is not a mandate for proportional representation." Hearings on S. 53 et al. before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 60 (1982). Thus, the compromise was not intended to exclude any elections from the coverage of subsection (a), but simply to make clear that the results test does not require the proportional election of minority candidates in *any* election.

[27] Moreover, this Court has recently recognized that judges do engage in policymaking at some level. See *Gregory* v. *Ashcroft*, *post*, at 466–467 ("It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature"). A judge brings to his or her job of interpreting texts "a well-considered judgment of what is best for the community." *Post*, at 466. As the concurrence notes, Justice Holmes and Justice Cardozo each wrote eloquently about the "policymaking nature of the judicial function." *Post*, at 482 (WHITE, J., concurring in part, dissenting in part, and concurring in judgment).

The word "representative" refers to someone who has prevailed in a popular election, whereas the word "candidate" refers to someone who is seeking an office. Thus, a candidate is nominated, not elected. When Congress used "candidate" in other parts of the statute, it did so precisely because it was referring to people who were aspirants for an office. See, *e. g.*, 42 U. S. C. §§ 1971(b) ("any candidate for the office of President"), 1971(e) ("candidates for public office"), 1973i(c) ("any candidate for the office of President"), 1973i(e)(2) ("any candidate for the office of President"), 1973l(c) ("candidates for public or party office"), 1973ff–2 ("In the case of the offices of President and Vice President, a vote for a named candidate"), 1974 ("candidates for the office of President"), 1974e ("candidates for the office of President").

The *LULAC* majority was, of course, entirely correct in observing that "judges need not be elected at all," 914 F. 2d, at 622, and that ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment. The Framers of the Constitution had a similar understanding of the judicial role, and as a consequence, they established that Article III judges would be appointed, rather than elected, and would be sheltered from public opinion by receiving life tenure and salary protection. Indeed, these views were generally shared by the States during the early years of the Republic.[28] Louisiana, however, has chosen a different course. It has decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do.

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for

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[28] See generally Winters, Selection of Judges—An Historical Introduction, 44 Texas L. Rev. 1081, 1082–1083 (1966).

elected office.[29] When each of several members of a court must be a resident of a separate district, and must be elected by the voters of that district, it seems both reasonable and realistic to characterize the winners as representatives of that district. Indeed, at one time the Louisiana Bar Association characterized the members of the Louisiana Supreme Court as representatives for that reason: "Each justice and judge now in office shall be considered as a representative of the judicial district within which is situated the parish of his residence at the time of his election."[30] Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2, as well as § 5, of the Voting Rights Act to continue to apply to its judicial elections.

The close connection between §§ 2 and 5 further undermines respondents' view that judicial elections should not be covered under § 2. Section 5 requires certain States to submit changes in their voting procedures to the District Court of the District of Columbia or to the Attorney General for preclearance. Section 5 uses language similar to that of § 2

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[29] "Financing a campaign, soliciting votes, and attempting to establish charisma or name identification are, at the very least, unseemly for judicial candidates" because "it is the business of judges to be indifferent to popularity." Stevens, The Office of an Office, Chicago Bar Rec. 276, 280, 281 (1974).

[30] Louisiana State Law Institute, Project of a Constitution for the State of Louisiana with Notes and Studies 1039 (1954) (1921 Report of the Louisiana Bar Association submitted to the Louisiana Constitutional Convention). The editors of the project explained that they included the 1921 Report because "on the major issues involved in revising the judicial provisions of the present constitution, it offers many proposals, that even after the passage of thirty years, still merit serious consideration. Of particular interest are the procedures for the selection, retirement and removal of judges. . . ." *Id.*, at 1035.

in defining prohibited practices: "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U. S. C. § 1973c. This Court has already held that § 5 applies to judicial elections. *Clark* v. *Roemer*, 500 U. S. 646 (1991). If § 2 did not apply to judicial elections, a State covered by § 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under § 2. It is unlikely that Congress intended such an anomalous result.

VI

Finally, both respondents and the *LULAC* majority suggest that no judicially manageable standards for deciding vote dilution claims can be fashioned unless the standard is based on the one-person, one-vote principle.[31] They reason that because we have held the one-person, one-vote rule inapplicable to judicial elections, see *Wells* v. *Edwards*, 409 U. S. 1095 (1973), aff'g 347 F. Supp., at 454, it follows that judicial elections are entirely immune from vote dilution

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[31] The "one-person, one-vote" principle was first set forth in *Gray* v. *Sanders*, 372 U. S. 368, 379, 381 (1963):

". . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

. . . . . .

". . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

Since then, the rule has been interpreted to mean that "each person's vote counts as much, insofar as it is practicable, as any other person's." *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U. S. 50, 54 (1970).

claims. The conclusion, however, does not follow from the premise.

The holding in *Wells* rejected a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment. It has no more relevance to a correct interpretation of this statute than does our decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which also rejected a constitutional claim. The statute was enacted to protect voting rights that are not adequately protected by the Constitution itself. Cf. *City of Rome* v. *United States*, 446 U. S. 156, 172–183 (1980). The standard that should be applied in litigation under § 2 is not at issue here.[32] Even if serious problems lie ahead in applying the "totality of circumstances" standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

VII

Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 315 (1966). In *Allen* v. *State Board of Elections*, 393 U. S. 544, 567 (1969), we said that the Act should be interpreted in a manner that provides "the broadest possible scope" in combating racial discrimination. Congress amended the Act in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, after a plurality of this Court had concluded that the original Act, like the

[32] We note, however, that an analysis of a proper statutory standard under § 2 need not rely on the one-person, one-vote constitutional rule. See *Thornburg* v. *Gingles*, 478 U. S., at 88–89 (O'CONNOR, J., concurring in judgment); see also *White* v. *Regester*, 412 U. S. 755 (1973) (holding that multimember districts were invalid, notwithstanding compliance with one-person, one-vote rule). Moreover, *Clark* v. *Roemer*, 500 U. S. 646 (1991), the case in which we held that § 5 applies to judicial elections, was a vote dilution case. The reasoning in JUSTICE SCALIA's dissent, see *post*, at 413–416, if valid, would have led to a different result in that case.

Fifteenth Amendment, contained such a requirement. See *Mobile* v. *Bolden*, 446 U. S. 55 (1980). Thus, Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone. It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view and hold that state judicial elections are included within the ambit of § 2 as amended.

The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. It is a statute. I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning. See, *e. g.*, *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U. S. 83, 98–99 (1991); *Demarest* v. *Manspeaker*, 498 U. S. 184, 190 (1991); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989); *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 557–558 (1990); *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 470 (1989) (KENNEDY, J., concurring in judgment).

Today, however, the Court adopts a method quite out of accord with that usual practice. It begins not with what the statute says, but with an expectation about what the statute must mean absent particular phenomena ("*[W]e are convinced* that if Congress had . . . an intent [to exclude judges] Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history," *ante*, at 396 (emphasis added)); and the Court then interprets the words of the statute to fulfill its expectation. Finding nothing in the legislative history affirming that judges were excluded from the coverage of §2, the Court gives the phrase "to elect representatives" the quite extraordinary meaning that covers the election of judges.

As method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it. Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, see Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899), and apply the meaning so determined. In my view, that reading reveals that §2 extends to vote dilution claims for the elections of representatives only, and judges are not representatives.

I

As the Court suggests, the 1982 amendments to the Voting Rights Act were adopted in response to our decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which had held that the scope of the original Voting Rights Act was coextensive with the Fifteenth Amendment, and thus proscribed intentional discrimination only. I agree with the Court that that original legislation, directed toward intentional discrimination, applied to all elections, for it clearly said so:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or ap-

plied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437.

The 1982 amendments, however, radically transformed the Act. As currently written, the statute proscribes intentional discrimination only if it has a discriminatory effect, but proscribes practices with discriminatory effect whether or not intentional. This new "results" criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination. The question we confront here is how broadly the new remedy applies. The foundation of the Court's analysis, the itinerary for its journey in the wrong direction, is the following statement: "It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection." *Ante*, at 404. There are two things wrong with this. First is the notion that Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute, "without comment" in the legislative history. As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. *Ante*, at 396, n. 23. Apart from the questionable wisdom of assuming that dogs will bark when something important is happening, see 1 T. Livius, The History of Rome 411–413 (1892) (D. Spillan transl.), we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. See *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie. See, *e. g.*, *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495–496, n. 13

(1985); *Williams* v. *United States*, 458 U. S. 279, 294–295 (1982) (MARSHALL, J., dissenting).

The more important error in the Court's starting point, however, is the assumption that the effect of excluding judges from the revised §2 would be to "withdr[aw] . . . an important category of elections from [the] protection [of the Voting Rights Act]." *Ante*, at 404. There is absolutely no question here of *withdrawing* protection. Since the pre-1982 content of §2 was coextensive with the Fifteenth Amendment, the entirety of that protection subsisted in the Constitution, and could be enforced through the other provisions of the Voting Rights Act. Nothing was lost from the prior coverage; *all* of the new "results" protection was an add-on. The issue is not, therefore, as the Court would have it, *ante*, at 395–396, whether Congress has cut back on the coverage of the Voting Rights Act; the issue is how far it has extended it. Thus, even if a court's expectations were a proper basis for interpreting the text of a statute, while there would be reason to expect that Congress was not "withdrawing" protection, there is no particular reason to expect that the supplemental protection it provided was any more extensive than the text of the statute said.

What it said, with respect to establishing a violation of the amended §2, is the following:

> ". . . A violation . . . is established if . . . it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate *to participate in the political process* and *to elect representatives of their choice*." 42 U. S. C. §1973(b) (emphasis added).

Though this text nowhere speaks of "vote dilution," *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), understood it to proscribe practices which produce that result, identifying as the statutory basis for a dilution claim the second of the two

phrases highlighted above—"to elect representatives of their choice."[1] Under this interpretation, the other highlighted phrase—"to participate in the political process"—is left for other, *nondilution* § 2 violations. If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "*to participate* in the political process" than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate, see Blumstein, Proving Race Discrimination, 69 Va. L. Rev. 633, 706–707 (1983).

The Court, however, now rejects *Thornburg*'s reading of the statute, and asserts that before a violation of § 2 can be made out, *both* conditions of § 2(b) must be met. As the Court explains,

> "As the statute is written, . . . the inability to elect representatives of their choice is not sufficient to establish a

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[1] As the *Thornburg* Court noted, the plaintiffs' allegation was "that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of . . . § 2 of the Voting Rights Act," 478 U. S., at 35. See also *id.*, at 46, n. 12 ("The claim we address in this opinion is . . . that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure"). And as we explained the requirement for recovery in the case:

"Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability *to elect* their preferred candidates." *Id.*, at 48 (emphasis added).

While disagreeing with the Court's formulation of a remedy, JUSTICE O'CONNOR acknowledged that this structure underlay the Court's analysis, pointing out that in the Court's view

"minority voting strength is to be assessed *solely* in terms of the minority group's ability *to elect* candidates it prefers. . . . Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability *to elect* the candidates its members prefer." *Id.*, at 88 (opinion concurring in judgment) (emphasis added and deleted).

> violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. . . . It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Ante*, at 397.

This is unquestionably wrong. If both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis "elect representatives of their choice" would be entirely without § 2 protection. Since, as the Court's analysis suggests, the "results" test of § 2 judges a violation of the "to elect" provision on the basis of whether the practice in question prevents actual election, then a protected class that with or without the practice will be unable to elect its candidate can be denied equal opportunity "to participate in the political process" with impunity. The Court feels compelled to reach this implausible conclusion of a "singular right" because the "to participate" clause and the "to elect" clause are joined by the conjunction "and." It is unclear to me why the rules of English usage require that conclusion here, any more than they do in the case of the First Amendment—which reads "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances. So also here, one is deprived of an equal "opportunity . . . to participate . . . and to elect" if *either* the opportunity to participate *or* the opportunity to elect is unequal. The point is in any event not central to the present case—and it is sad to see the Court repudiate

Thornburg, create such mischief in the application of § 2, and even cast doubt upon the First Amendment, merely to deprive the State of the argument that elections for judges *remain* covered by § 2 *even though* they are not subject to vote dilution claims.[2]

The Court, petitioners, and petitioners' *amici* have labored mightily to establish that there is *a* meaning of "representatives" that would include judges, see, *e. g.*, Brief for Lawyers Committee for Civil Rights as *Amicus Curiae* 10–11, and no doubt there is. But our job is not to scavenge the world of English usage to discover whether there is any possible meaning of "representatives" which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.

There is little doubt that the ordinary meaning of "representatives" does not include judges, see Webster's Second New International Dictionary 2114 (1950). The Court's feeble argument to the contrary is that "representatives" means those who "are chosen by popular election." *Ante*, at 399. On that hypothesis, the fan-elected members of the baseball all-star teams are "representatives"—hardly a common, if even a permissible, usage. Surely the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. As the captions of the pleadings in some States still display, it is

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[2] The Court denies that this conclusion follows, because, as it claims, it "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Ante*, at 397, n. 24. I make no such assumption. I only assume that by "to elect" the statute does not mean "to influence," just as I assume that by "representatives" the statute does not mean "judges." We do not reject Conan Doyle's method of statutory interpretation only to embrace Lewis Carroll's.

the prosecutor who represents "the People"; the judge represents the Law—which often requires him to rule against the People. It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment's requirement of "one person, one vote." *Wells* v. *Edwards*, 347 F. Supp. 453 (MD La. 1972), aff'd, 409 U. S. 1095 (1973). The point is not that a State could not make judges in some senses representative, or that all judges must be conceived of in the Article III mold, but rather, that giving "representatives" its ordinary meaning, the ordinary speaker in 1982 would not have applied the word to judges, see Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899). It remains only to ask whether there is good indication that ordinary meaning does not apply.

There is one canon of construction that might be applicable to the present cases which, in some circumstances, would counter ordinary meaning—but here it would only have the effect of *reinforcing* it. We apply that canon to another case today, concerning, curiously enough, the very same issue of whether state judges are covered by the provisions of a federal statute. In *Gregory* v. *Ashcroft*, *post*, p. 452, we say that unless it is *clear* that the term "appointee[s] on the policymaking level" does not include judges we will construe it to include them, since the contrary construction would cause the statute to intrude upon the structure of state government, establishing a federal qualification for state judicial office. Such intrusion, we say, requires a "plain statement" before we will acknowledge it. See also *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984). If the same principle were applied here, we would have double reason to give "representatives" its ordinary meaning. It is true, however, that in *Gregory* interpreting the statute to include judges would make them the only high-level state

officials affected, whereas here the question is whether judges were excluded from a general imposition upon state elections that unquestionably exists; and in *Gregory* it is questionable whether Congress was invoking its powers under the Fourteenth Amendment (rather than merely the Commerce Clause), whereas here it is obvious. Perhaps those factors suffice to distinguish the two cases. Moreover, we tacitly rejected a "plain statement" rule as applied to the unamended § 2 in *City of Rome* v. *United States*, 446 U. S. 156, 178–180 (1980), though arguably that was before the rule had developed the significance it currently has. I am content to dispense with the "plain statement" rule in the present cases, cf. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 41–42 (1989) (opinion of SCALIA, J.)—but it says something about the Court's approach to this decision that the possibility of applying that rule never crossed its mind.

While the "plain statement" rule may not be applicable, there is assuredly nothing whatever that points in the opposite direction, indicating that the ordinary meaning here should *not* be applied. Far from that, in my view the ordinary meaning of "representatives" gives clear purpose to congressional action that otherwise would seem pointless. As an initial matter, it is evident that Congress paid particular attention to the scope of elections covered by the "to elect" language. As the Court suggests, that language for the most part tracked this Court's opinions in *White* v. *Regester*, 412 U. S. 755, 766 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971), but the word "legislators" was not copied. Significantly, it was replaced not with the more general term "candidates" used repeatedly elsewhere in the Act, see, *e. g.*, 42 U. S. C. §§ 1971(b), (e); 1973i(c); 1973*l*(c)(1); 1973ff–2; 1974; 1974e, but with the term "representatives," which appears nowhere else in the Act (except as a proper noun referring to Members of the federal lower House, or designees of the Attorney General). The normal meaning of this term is broader than "legislators" (it includes, for example, school

boards and city councils as well as senators and representatives) but narrower than "candidates."

The Court says that the seemingly significant refusal to use the term "candidate" and selection of the distinctive term "representative" are really inconsequential, because "candidate" could not have been used. According to the Court, since "candidate" refers to one who has been nominated but *not yet* elected, the phrase "to elect candidates" would be a contradiction in terms. *Ante*, at 399–400. The only flaw in this argument is that it is not true, as repeated usage of the formulation "to elect candidates" by this Court itself amply demonstrates. See, *e. g.*, *Davis* v. *Bandemer*, 478 U. S. 109, 131 (1986); *Rogers* v. *Lodge*, 458 U. S. 613, 624 (1982); *id.*, at 639, n. 18, 641, n. 22, 649 (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U. S., at 75; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 158 (1977); *Moore* v. *Ogilvie*, 394 U. S. 814, 819 (1969); *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 569 (1969). We even used the phrase repeatedly in *Thornburg*. *Thornburg* v. *Gingles*, 478 U. S., at 40, 44, 50, 54, 80; *id.*, at 86, 103 (O'CONNOR, J., concurring in judgment); *id.*, at 107 (STEVENS, J., concurring in part and dissenting in part). And the phrase is used in the complaint of the minority plaintiffs in the other §2 case decided today. *Houston Lawyers' Assn.* v. *Attorney General of Texas*, *post*, p. 419. App. in Nos. 90–813, 90–974, p. 22a. In other words, far from being an impermissible choice, "candidates" would have been the natural choice, even if it had not been used repeatedly elsewhere in the statute. It is quite absurd to think that Congress went out of its way to replace that term with "representatives," in order to convey what "candidates" naturally suggests (viz., coverage of *all* elections) and what "representatives" naturally does not.

A second consideration confirms that "representatives" in §2 was meant in its ordinary sense. When given its ordinary meaning, it causes the statute to reproduce an estab-

officials affected, whereas here the question is whether judges were excluded from a general imposition upon state elections that unquestionably exists; and in *Gregory* it is questionable whether Congress was invoking its powers under the Fourteenth Amendment (rather than merely the Commerce Clause), whereas here it is obvious. Perhaps those factors suffice to distinguish the two cases. Moreover, we tacitly rejected a "plain statement" rule as applied to the unamended § 2 in *City of Rome* v. *United States*, 446 U. S. 156, 178–180 (1980), though arguably that was before the rule had developed the significance it currently has. I am content to dispense with the "plain statement" rule in the present cases, cf. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 41–42 (1989) (opinion of SCALIA, J.)—but it says something about the Court's approach to this decision that the possibility of applying that rule never crossed its mind.

While the "plain statement" rule may not be applicable, there is assuredly nothing whatever that points in the opposite direction, indicating that the ordinary meaning here should *not* be applied. Far from that, in my view the ordinary meaning of "representatives" gives clear purpose to congressional action that otherwise would seem pointless. As an initial matter, it is evident that Congress paid particular attention to the scope of elections covered by the "to elect" language. As the Court suggests, that language for the most part tracked this Court's opinions in *White* v. *Regester*, 412 U. S. 755, 766 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971), but the word "legislators" was not copied. Significantly, it was replaced not with the more general term "candidates" used repeatedly elsewhere in the Act, see, *e. g.*, 42 U. S. C. §§ 1971(b), (e); 1973i(c); 1973*l*(c)(1); 1973ff–2; 1974; 1974e, but with the term "representatives," which appears nowhere else in the Act (except as a proper noun referring to Members of the federal lower House, or designees of the Attorney General). The normal meaning of this term is broader than "legislators" (it includes, for example, school

boards and city councils as well as senators and representatives) but narrower than "candidates."

The Court says that the seemingly significant refusal to use the term "candidate" and selection of the distinctive term "representative" are really inconsequential, because "candidate" could not have been used. According to the Court, since "candidate" refers to one who has been nominated but *not yet* elected, the phrase "to elect candidates" would be a contradiction in terms. *Ante*, at 399–400. The only flaw in this argument is that it is not true, as repeated usage of the formulation "to elect candidates" by this Court itself amply demonstrates. See, *e. g.*, *Davis* v. *Bandemer*, 478 U. S. 109, 131 (1986); *Rogers* v. *Lodge*, 458 U. S. 613, 624 (1982); *id.*, at 639, n. 18, 641, n. 22, 649 (STEVENS, J., dissenting); *Mobile* v. *Bolden*, 446 U. S., at 75; *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 158 (1977); *Moore* v. *Ogilvie*, 394 U. S. 814, 819 (1969); *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 569 (1969). We even used the phrase repeatedly in *Thornburg. Thornburg* v. *Gingles*, 478 U. S., at 40, 44, 50, 54, 80; *id.*, at 86, 103 (O'CONNOR, J., concurring in judgment); *id.*, at 107 (STEVENS, J., concurring in part and dissenting in part). And the phrase is used in the complaint of the minority plaintiffs in the other §2 case decided today. *Houston Lawyers' Assn.* v. *Attorney General of Texas*, *post*, p. 419. App. in Nos. 90–813, 90–974, p. 22a. In other words, far from being an impermissible choice, "candidates" would have been the natural choice, even if it had not been used repeatedly elsewhere in the statute. It is quite absurd to think that Congress went out of its way to replace that term with "representatives," in order to convey what "candidates" naturally suggests (viz., coverage of *all* elections) and what "representatives" naturally does not.

A second consideration confirms that "representatives" in §2 was meant in its ordinary sense. When given its ordinary meaning, it causes the statute to reproduce an estab-

lished, eminently logical, and perhaps practically indispensable limitation upon the availability of vote dilution claims. Whatever other requirements may be applicable to elections for "representatives" (in the sense of those who are not only elected by but act on behalf of the electorate), those elections, unlike elections for *all* officeholders, must be conducted in accordance with the equal protection principle of "one person, one vote." And it so happens—more than coincidentally, I think—that in every case in which, prior to the amendment of § 2, we recognized the possibility of a vote dilution claim, the principle of "one person, one vote" was applicable. See, *e. g.*, *Fortson* v. *Dorsey*, 379 U. S. 433, 436 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966); *Whitcomb* v. *Chavis*, *supra*, at 149–150; *White* v. *Regester*, *supra*, at 765–767; see also *Davis* v. *Bandemer*, *supra*, at 131–132. Indeed, it is the principle of "one person, one vote" that gives meaning to the concept of "dilution." One's vote is diluted if it is not, *as it should be*, of the same practical effect as everyone else's. Of course the mere fact that an election practice satisfies the constitutional requirement of "one person, one vote" does not establish that there has been no vote dilution for Voting Rights Act purposes, since that looks not merely to equality of individual votes but also to equality of minority blocs of votes. (*White* itself, which dealt with a multimember district, demonstrates this point. See also *Mobile* v. *Bolden*, *supra*, at 65.) But "one person, one vote" has been the premise and the necessary condition of a vote dilution claim, since it establishes the baseline for computing the voting strength that the minority bloc *ought to have*. As we have suggested, the first question in a dilution case is whether the "one-person, one-vote" standard is met, and if it is, the second is whether voting structures nonetheless operate to "'minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Burns* v. *Richardson*, *supra*, at 88. See also Note, Fair and Effective Voting Strength Under Section 2 of the Voting Rights Act: The

Impact of Thornburg v. Gingles on Minority Vote Dilution Litigation, 34 Wayne L. Rev. 303, 323–324 (1987).

Well before Congress amended § 2, we had held that the principle of "one person, one vote" does not apply to the election of judges, *Wells* v. *Edwards*, 347 F. Supp. 453 (MD La. 1972), aff'd, 409 U. S. 1095 (1973). If Congress was (through use of the extremely inapt word "representatives") making vote dilution claims available with respect to the election of judges, it was, for the first time, extending that remedy to a context in which "one person, one vote" did not apply. *That* would have been a significant change in the law, and given the need to identify some other baseline for computing "dilution," *that* is a matter which those who believe in barking dogs should be astounded to find unmentioned in the legislative history. If "representatives" is given its normal meaning, on the other hand, there is no change in the law (except elimination of the intent requirement) and the silence is entirely understandable.

I frankly find it very difficult to conceive how it is to be determined whether "dilution" has occurred, once one has eliminated *both* the requirement of actual intent to disfavor minorities, *and* the principle that 10,000 minority votes throughout the State should have as much practical "electability" effect as 10,000 nonminority votes. How does one begin to decide, in such a system, how much elective strength a minority bloc *ought* to have? I do not assert that it is utterly impossible to impose "vote dilution" restrictions upon an electoral regime that is not based on the "one-person, one-vote" principle. Congress can define "vote dilution" to be whatever it will, within constitutional bounds. But my point is that "one person, one vote" is inherent in the normal concept of "vote dilution," and was an essential element of the pre-existing, judicially crafted definition under § 2; that Congress did *not* adopt any new definition; that creating a new definition is a seemingly standardless task; and that the word Congress selected ("representative") seems specifically de-

signed to avoid these problems. The Court is stoic about the difficulty of defining "dilution" without a standard of purity, expressing its resolve to stand up to that onerous duty inescapably thrust upon it: "Even if serious problems lie ahead in applying the 'totality of the circumstances' standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Ante*, at 403. One would think that Congress had said "candidates," rather than "representatives." In reality, however, it is the Court rather than Congress that leads us—quite unnecessarily and indeed with stubborn persistence—into this morass of unguided and perhaps unguidable judicial interference in democratic elections. The Court attributes to Congress not only the intent to mean something other than what it said, but also the intent to let district courts invent (for there is no precedent where "one person, one vote" did not apply that Congress could have been consulting) what in the world constitutes dilution of a vote that does not have to be equal.

Finally, the Court suggests that there is something "anomalous" about extending coverage under § 5 of the Voting Rights Act to the election of judges, while not extending coverage under § 2 to the same elections. *Ante*, at 402. This simply misconceives the different roles of § 2 and § 5. The latter requires certain jurisdictions to preclear changes in election methods before those changes are implemented; it is a means of assuring in advance the absence of all electoral illegality, not only that which violates the Voting Rights Act but that which violates the Constitution as well. In my view, judges *are* within the scope of § 2 for nondilution claims, and thus for those claims, § 5 preclearance would enforce the Voting Rights Act with respect to judges. Moreover, intentional discrimination in the election of judges, whatever its form, is constitutionally prohibited, and the preclearance provision of § 5 gives the Government a method by which to pre-

vent that. The scheme makes entire sense without the need to bring judges within the "to elect" provision.

All this is enough to convince me that there is sense to the ordinary meaning of "representative" in §2(b)—that there is reason to Congress' choice—and since there is, then, under our normal presumption, that ordinary meaning prevails. I would read §2 as extending vote dilution claims to elections for "representatives," but not to elections for judges. For other claims under §2, however—those resting on the "to participate in the political process" provision rather than the "to elect" provision—no similar restriction would apply. Since the claims here are exclusively claims of dilution, I would affirm the judgment of the Fifth Circuit.

* * *

As I said at the outset, these cases are about method. The Court transforms the meaning of §2, not because the ordinary meaning is irrational, or inconsistent with other parts of the statute, see, *e. g.*, *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 510–511 (1989); *Public Citizen* v. *Department of Justice*, 491 U. S., at 470 (KENNEDY, J., concurring in judgment), but because it does not fit the Court's conception of what Congress must have had in mind. When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning. Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people's will. We have ignored that responsibility today. I respectfully dissent.

JUSTICE KENNEDY, dissenting.

I join JUSTICE SCALIA's dissent in full. I write to add only that the issue before the Court is one of statutory construction, not constitutional validity. Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act of 1965, as interpreted in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), is consistent with the requirements of the United States Constitution.

HOUSTON LAWYERS' ASSOCIATION ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–813. Argued April 22, 1991—Decided June 20, 1991*

Texas district courts are the State's trial courts of general jurisdiction. Their judges are elected from electoral districts consisting of one or more entire counties. The number of judges in each district varies, but each is elected by voters in the district in which he or she sits, pursuant to an at-large, district-wide scheme, and must be a resident of that district. Although several judicial candidates in the same district may be running in the same election, each runs for a separately numbered position. In the primary, the winner must receive a majority of votes, but in the general election the candidate with the highest number of votes for a particular numbered position is elected. Petitioners in No. 90–974, local chapters of the League of United Latin American Citizens—an organization composed of Mexican-American and African-American Texas residents and others—filed suit in the District Court against respondents, the state attorney general and other officials, alleging that the electoral scheme in 10 counties diluted the voting strength of African-American and Hispanic voters in violation of, *inter alia*, § 2 of the Voting Rights Act of 1965. Petitioners in No. 90–813—the Houston Lawyers' Association, an organization of African-American attorneys registered to vote in one of the 10 counties, and others—intervened in support of the original plaintiffs. The District Court ruled in petitioners' favor and granted interim relief for the 1990 election. The Court of Appeals reversed, holding that judicial elections are not covered by § 2. A separate opinion concurring in the judgment agreed that elections for single-member offices, such as the district judgeships, are exempt from § 2. According to that opinion, a district court judge, unlike an appellate judge who acts as a member of a collegial body, is a single-office holder who has jurisdiction that is coextensive with the geographic area from which he or she is elected and has authority to render final decisions independently of other judges serving in the same area or on the same court. The concurrence concluded that exemption from § 2 of elections for district judges is justi-

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*Together with No. 90–974, *League of United Latin American Citizens et al.* v. *Attorney General of Texas et al.*, also on certiorari to the same court.

fied, given the State's compelling interest in linking jurisdiction and elective base for judges acting alone, and given the risk that attempting to break that linkage might lessen minority influence by making only a few judges principally accountable to the minority electorate rather than making all of them partly accountable to minority voters.

Held: The Act's coverage encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected. Once a State decides to elect its trial judges, those elections must be conducted in compliance with the Act, since judicial elections are not categorically excluded from coverage. *Chisom* v. *Roemer*, *ante*, p. 380. The state interest expressed in the concurring opinion below does not justify excluding single-member offices from § 2's *coverage*. Rather, it is a legitimate factor to be considered by courts in determining whether, based on the "totality of circumstances," a vote dilution *violation* has occurred or may be remedied. Pp. 425–428.

914 F. 2d 620, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 428.

Julius LeVonne Chambers argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 90–813 was *Charles Stephen Ralston*. *Susan Finkelstein*, *Edward B. Cloutman III*, *E. Brice Cunningham*, *William L. Garrett*, *Rolando L. Rios*, and *David Hall* filed a brief for petitioners in No. 90–974.

Renea Hicks, Special Assistant Attorney General of Texas, argued the cause for respondents in both cases. With him on the brief for state respondents were *Dan Morales*, Attorney General, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Javier P. Guajardo*, Special Assistant Attorney General. *J. Eugene Clements* filed a brief for respondent Wood. *Robert H. Mow, Jr.*, *David C. Godbey*, and *Bobby M. Rubarts* filed a brief for respondent Entz.†

†Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Dunne*, *Deputy So-*

JUSTICE STEVENS delivered the opinion of the Court.

In *Chisom* v. *Roemer*, *ante*, p. 380, we held that judicial elections, and, more specifically, elections of justices of the Supreme Court of Louisiana, are covered by § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended in 1982, 42 U. S. C. § 1973. In these cases we consider whether the statute also applies to the election of trial judges in Texas. We hold that it does.

I

Petitioners in No. 90–974 are local chapters of the League of United Latin American Citizens, a statewide organization composed of both Mexican-American and African-American residents of the State of Texas, and various individuals. They brought this action against the attorney general of

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licitor General Roberts, Deputy Assistant Attorney General Clegg, Paul J. Larkin, Jr., Jessica Dunsay Silver, and *Mark L. Gross;* and for the Lawyers' Committee for Civil Rights Under Law by *Frank R. Parker, Robert B. McDuff, Brenda Wright, Robert F. Mullen, David S. Tatel, Norman Redlich, Samuel Rabinove, Richard T. Foltin, Antonia Hernandez, Judith Sanders-Castro, Laughlin McDonald, Neil Bradley, Kathleen L. Wilde,* and *Mary Wyckoff.*

Briefs of *amici curiae* urging affirmance were filed for the State of Georgia by *Michael J. Bowers,* Attorney General, *Carol Atha Cosgrove,* Senior Assistant Attorney General, and *David F. Walbert;* for the State of Tennessee et al. by *Charles W. Burson,* Attorney General of Tennessee, *John Knox Walkup,* Solicitor General, and *Michael W. Catalano,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Lacy H. Thornburg* of North Carolina, *Nicholas Spaeth* of North Dakota, *Robert H. Henry* of Oklahoma, *Ernest D. Preate, Jr.,* of Pennsylvania, and *Ken Eikenberry* of Washington; for the Florida Conference of Circuit Judges et al. by *John F. Harkness, Jr., William F. Blews, Ronald A. Labasky, James Fox Miller, Benjamin H. Hill III,* and *Barry S. Richard;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso.*

Edwin F. Hendricks filed a brief for the American Judicature Society as *amicus curiae.*

Texas and other officials (respondents) to challenge the existing at-large, countywide method of electing state district judges. Although the original challenge encompassed the entire State and relied on both constitutional and statutory grounds, the issues were later narrowed to include only a statutory challenge to the voting methods in just 10 counties.* Petitioners in No. 90–813 are the Houston Lawyers' Association, an organization of African-American attorneys who are registered voters in Harris County, and certain individuals; they are intervenors, supporting the position of the original plaintiffs. Because all of the petitioners have the same interest in the threshold issue of statutory construction that is now before us, we shall refer to them collectively as "petitioners."

Texas district courts are the State's trial courts of general jurisdiction. Electoral districts for Texas district judges consist of one or more entire counties. Eight of the districts included in these cases include a single county; the other district includes two counties. The number of district judges in each district at issue varies from the 59 that sit in the Harris County district to the 3 that sit in the Midland County district. Each judge is elected by the voters in the district in which he or she sits pursuant to an at-large, district-wide electoral scheme, and must be a resident of that district. Although several judicial candidates in the same district may be running in the same election, each runs for a separately numbered position. Thus, for example, if there are 25 vacancies in the Harris County district in a particular year, there are 25 district-wide races for 25 separately numbered positions. In the primary elections, the winner must receive a majority of votes, but in the general election, the candidate with the highest number of votes for a particular numbered position is elected.

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*The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Crosby, Ector, and Midland.

Petitioners challenged the at-large, district-wide electoral scheme as diluting the voting strength of African-American and Hispanic voters. They cited the example of Harris County, which has a population that is 20% African-American but has only 3 of 59 district judges that are African-American. The petitioners alleged that alternative electoral schemes using electoral subdistricts or modified at-large structures could remedy the dilution of minority votes in district judge elections.

Following a 1-week trial, the District Court ruled in favor of petitioners on their statutory vote dilution claim. It concluded that petitioners had sustained their burden of proving that under the totality of the circumstances "as a result of the challenged at large system [they] do not have an equal opportunity to participate in the political processes and to elect candidates of their choice," App. to Pet. for Cert. 290a–291a (footnote omitted); *id.*, at 300a–301a. Although the District Court made no findings about the appropriate remedy for the proven violation, it urged the state legislature to select and approve an alternative district judge election scheme. The District Court also announced that it would entertain motions to enjoin future district judge elections pending the remedy phase of the litigation, should the legislature fail to adopt an alternative election scheme. When the state legislature failed to act, the District Court granted interim relief (to be used solely for the 1990 election of district judges in the nine districts) that included the creation of electoral subdistricts and a prohibition against the use of partisan elections for district judges. Respondents appealed.

A three-judge panel of the Fifth Circuit reversed the judgment of the District Court, 902 F. 2d 293 (1990), and petitioners' motion for rehearing en banc was granted, 902 F. 2d 322 (1990). The en banc majority held that the results test in § 2 of the Voting Rights Act of 1965, as amended in 1982, is inapplicable to judicial elections. See 914 F. 2d 620 (1990). In essence, the majority concluded that Congress' reference to

the voters' opportunity to elect "representatives" of their choice evidenced a deliberate decision to exclude the election of judges from scrutiny under the newly enacted test. For reasons stated in our opinion in *Chisom*, *ante*, at 391–403, we reject that conclusion.

In a separate opinion, portions of which were joined by five other judges, Judge Higginbotham expressed his disagreement with the majority's conclusion that judges are not "representatives" within the meaning of the Act, but concurred in the judgment of reversal. His opinion relied on a distinction between state appellate judges and trial judges. Whereas the justices of the Louisiana Supreme Court have statewide jurisdiction, even though they are elected by voters in separate districts, and act as members of a collegial body, the Texas trial judge has jurisdiction that is coextensive with the geographic area from which he or she is elected and has the sole authority to render final decisions. Judge Higginbotham's opinion characterized trial judges "as single-office holders instead of members of a multi-member body," 914 F. 2d, at 649 (opinion concurring in judgment), because each exercises his or her authority independently of the other judges serving in the same area or on the same court. Given the State's "compelling interest in linking jurisdiction and elective base for judges acting alone," *id.*, at 651, and the risk that "attempting to break the linkage of jurisdiction and elective base . . . may well lessen minority influence instead of increase it," *id.*, at 649, by making only a few district court judges principally accountable to the minority electorate rather than making all of the district's judges partly accountable to minority voters, he concluded that elections for single-member offices, including elections for Texas district court judgeships, are exempt from vote dilution challenges under § 2.

Chief Judge Clark, while agreeing with the judgment of reversal on grounds "expressly limited to the facts of the present case," *id.*, at 631 (opinion concurring specially), dis-

agreed with the analysis in both the majority and the opinion concurring in the judgment. He expressed the opinion that "it is equally wrong to say that section 2 covers *all* judicial elections as it is to say it covers *none*," *id.*, at 633 (emphasis in original). Characterizing Judge Higginbotham's "function-of-the-office analysis" as "identical in concept to the majority view," *ibid.*, Chief Judge Clark would have held that whenever an officeholder's jurisdiction and the area of residence of his or her electorate coincide, no vote dilution claims may be brought against at-large schemes for electing the officeholder, regardless of whether the "function" of the officeholder is to act alone or as a member of a collegial body.

In a dissenting opinion, Judge Johnson argued that the Act applies to all judicial elections:

> "Several truths are self-evident from the clear language of the statute that had heretofore opened the electoral process to people of all colors. The Voting Rights Act focuses on the *voter*, not the elected official. The Act was intended to prohibit racial discrimination in *all* voting, the sole inquiry being whether the political processes are equally open to all persons, no matter their race or color. The Act is concerned only with the intent of persons of 'race or color' in casting a ballot; it has no interest in the function of the person holding the office." *Id.*, at 652 (emphasis in original).

II

We granted certiorari in these cases, 498 U. S. 1060 (1991), and in *Chisom* v. *Roemer*, *ante*, p. 380, for the limited purpose of considering the scope of the coverage of § 2. As we have held in *Chisom*, the Act does not categorically exclude judicial elections from its coverage. The term "representatives" is not a word of limitation. Nor can the protection of minority voters' unitary right to an equal opportunity "to participate in the political process and to elect representatives of their choice" be bifurcated into two kinds of claims

in judicial elections, one covered and the other beyond the reach of the Act. *Ante*, at 398. It is equally clear, in our opinion, that the coverage of the Act encompasses the election of executive officers and trial judges whose responsibilities are exercised independently in an area coextensive with the districts from which they are elected. If a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act.

We deliberately avoid any evaluation of the merits of the concerns expressed in Judge Higginbotham's opinion concurring in the judgment because we believe they are matters that are relevant either to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended, or to a consideration of possible remedies in the event a violation is proved, but not to the threshold question of the Act's coverage. Even if we assume, *arguendo*, that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts, or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case, that interest does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test. Rather, such a state interest is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding of a vote dilution *violation* in an election for a single-member office.

Thus we disagree with respondents that the "single-member office" theory automatically exempts certain elections from the coverage of § 2. Rather, we believe that the State's interest in maintaining an electoral system—in these cases, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its elec-

toral system is a proper factor for the courts to assess in a racial vote dilution inquiry, and the Fifth Circuit has expressly approved the use of this particular factor in the balance of considerations. See *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1305 (1973), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976). Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the "totality of circumstances," that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

Two examples will explain why the "single-member office" theory, even if accepted, cannot suffice to place an election for a single-member-office holder entirely beyond the coverage of § 2 of the Act. First, if a particular practice or procedure, such as closing the polls at noon, results in an abridgment of a racial minority's opportunity to vote and to elect representatives of their choice, the Act would unquestionably apply to restrict such practices, regardless of whether the election was for a single-member-office holder or not. Exempting elections for single-member offices from the reach of § 2 altogether can therefore not be supported. As we stated earlier, this statute does not separate vote dilution challenges from other challenges brought under the amended § 2. See *supra*, at 425–426.

Second, if the boundaries of the electoral district—and perhaps of its neighboring district as well—were shaped in "an uncouth twenty-eight-sided figure" such as that found in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340 (1960), and if the effect of the configuration were to produce an unnatural distribution of the voting power of different racial groups, an inquiry into the totality of circumstances would at least arguably be required to determine whether or not the results test was violated. Placing elections for single-member offices entirely beyond the scope of coverage of § 2 would preclude such an inquiry, even if the State's interest in maintaining

the "uncouth" electoral system was trivial or illusory and even if any resulting impairment of a minority group's voting strength could be remedied without significantly impairing the State's interest in electing judges on a district-wide basis.

Because the results test in § 2 of the Voting Rights Act applies to claims of vote dilution in judicial elections, see *Chisom*, *ante*, at 404, and because the concerns expressed by Judge Higginbotham in distinguishing elections of Texas district court judges from elections of supreme court justices relate to the question whether a vote dilution violation may be found or remedied rather than whether such a challenge may be brought, we reverse the judgment of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

For the reasons stated in my opinion in *Chisom* v. *Roemer*, *ante*, p. 404, I would not apply § 2 of the Voting Rights Act of 1965 to vote dilution claims in judicial elections, and would therefore affirm the judgment below.

Syllabus

FLORIDA *v.* BOSTICK

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 89–1717. Argued February 26, 1991—Decided June 20, 1991

As part of a drug interdiction effort, Broward County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage. Two officers boarded respondent Bostick's bus and, without articulable suspicion, questioned him and requested his consent to search his luggage for drugs, advising him of his right to refuse. He gave his permission, and the officers, after finding cocaine, arrested Bostick on drug trafficking charges. His motion to suppress the cocaine on the ground that it had been seized in violation of the Fourth Amendment was denied by the trial court. The Florida Court of Appeal affirmed, but certified a question to the State Supreme Court. That court, reasoning that a reasonable passenger would not have felt free to leave the bus to avoid questioning by the police, adopted a *per se* rule that the sheriff's practice of "working the buses" is unconstitutional.

Held:

1. The Florida Supreme Court erred in adopting a *per se* rule that every encounter on a bus is a seizure. The appropriate test is whether, taking into account all of the circumstances surrounding the encounter, a reasonable passenger would feel free to decline the officers' requests or otherwise terminate the encounter. Pp. 433–437.

(a) A consensual encounter does not trigger Fourth Amendment scrutiny. See *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16. Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions, *Florida* v. *Rodriguez*, 469 U. S. 1, 5–6, ask to examine identification, *INS* v. *Delgado*, 466 U. S. 210, 216, and request consent to search luggage, *Florida* v. *Royer*, 460 U. S. 491, 501, provided they do not convey a message that compliance with their requests is required. Thus, there is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the bus terminal, it would not be a seizure. Pp. 434–435.

(b) That this encounter took place on a bus is but one relevant factor in determining whether or not it was of a coercive nature. The state court erred in focusing on the "free to leave" language of *Michigan* v. *Chesternut*, 486 U. S. 567, 573, rather than on the principle that those words were intended to capture. This inquiry is not an accurate measure of an encounter's coercive effect when a person is seated on a bus about to depart, has no desire to leave, and would not feel free to leave

even if there were no police present. The more appropriate inquiry is whether a reasonable passenger would feel free to decline the officers' request or otherwise terminate the encounter. Thus, this case is analytically indistinguishable from *INS* v. *Delgado*, *supra*. There, no seizure occurred when INS agents visited factories at random, stationing some agents at exits while others questioned workers, because, even though workers were not free to leave without being questioned, the agents' conduct gave them no reason to believe that they would be detained if they answered truthfully or refused to answer. Such a refusal, alone, does not furnish the minimal level of objective justification needed for detention or seizure. *Id.*, at 216–217. Pp. 435–437.

2. This case is remanded for the Florida courts to evaluate the seizure question under the correct legal standard. The trial court made no express findings of fact, and the State Supreme Court rested its decision on a single fact—that the encounter took place on a bus—rather than on the totality of the circumstances. Rejected, however, is Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage containing drugs, since the "reasonable person" test presumes an *innocent* person. Pp. 437–440.

554 So. 2d 1153, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 440.

Joan Fowler, Assistant Attorney General of Florida, argued the cause for petitioner. With her on the brief was *Robert A. Butterworth*, Attorney General.

Solicitor General Starr argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, *Christopher J. Wright*, and *Kathleen A. Felton*.

Donald B. Ayer argued the cause for respondent. With him on the brief was *Robert H. Klonoff*.*

**Mary Irene Coombs*, *Steven R. Shapiro*, *John A. Powell*, *James K. Green*, *Jeffrey S. Weiner*, and *Robert G. Amsel* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Fred E. Inbau, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement as *amicus curiae*.

JUSTICE O'CONNOR delivered the opinion of the Court.

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

I

Drug interdiction efforts have led to the use of police surveillance at airports, train stations, and bus depots. Law enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions. Broward County has adopted such a program. County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage.

In this case, two officers discovered cocaine when they searched a suitcase belonging to Terrance Bostick. The underlying facts of the search are in dispute, but the Florida Supreme Court, whose decision we review here, stated explicitly the factual premise for its decision:

> "'Two officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotics agents on the

> lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage. Needless to say, there is a conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.'" 554 So. 2d 1153, 1154–1155 (1989), quoting 510 So. 2d 321, 322 (Fla. App. 1987) (Letts, J., dissenting in part).

Two facts are particularly worth noting. First, the police specifically advised Bostick that he had the right to refuse consent. Bostick appears to have disputed the point, but, as the Florida Supreme Court noted explicitly, the trial court resolved this evidentiary conflict in the State's favor. Second, at no time did the officers threaten Bostick with a gun. The Florida Supreme Court indicated that one officer carried a zipper pouch containing a pistol—the equivalent of carrying a gun in a holster—but the court did not suggest that the gun was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner. The dissent's characterization of the officers as "gun-wielding inquisitor[s]," *post*, at 448, is colorful, but lacks any basis in fact.

Bostick was arrested and charged with trafficking in cocaine. He moved to suppress the cocaine on the grounds that it had been seized in violation of his Fourth Amendment rights. The trial court denied the motion but made no factual findings. Bostick subsequently entered a plea of guilty, but reserved the right to appeal the denial of the motion to suppress.

The Florida District Court of Appeal affirmed, but considered the issue sufficiently important that it certified a question to the Florida Supreme Court. 510 So. 2d, at 322. The

Supreme Court reasoned that Bostick had been seized because a reasonable passenger in his situation would not have felt free to leave the bus to avoid questioning by the police. 554 So. 2d, at 1154. It rephrased and answered the certified question so as to make the bus setting dispositive in every case. It ruled categorically that "'an impermissible seizure result[s] when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage.'" *Ibid.* The Florida Supreme Court thus adopted a *per se* rule that the Broward County Sheriff's practice of "working the buses" is unconstitutional.* The result of this decision is that police in Florida, as elsewhere, may approach persons at random in most public places, ask them questions and seek consent to a search, see *id.*, at 1156; but they may not engage in the same behavior on a bus. *Id.*, at 1157. We granted certiorari, 498 U. S. 894 (1990), to determine whether the Florida Supreme Court's *per se* rule is consistent with our Fourth Amendment jurisprudence.

II

The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a "seizure" within the meaning of the Fourth Amendment. The State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable

*The dissent acknowledges that the Florida Supreme Court's answer to the certified question reads like a *per se* rule, but dismisses as "implausible" the notion that the court would actually apply this rule to "trump" a careful analysis of all the relevant facts. *Post*, at 445. Implausible as it may seem, that is precisely what the Florida Supreme Court does. It routinely grants review in bus search cases and quashes denials of motions to suppress *expressly on the basis of its answer to the certified question in this case*. See, *e. g.*, *McBride* v. *State*, 554 So. 2d 1160 (1989); *Mendez* v. *State*, 554 So. 2d 1161 (1989); *Shaw* v. *State*, 555 So. 2d 351 (1989); *Avery* v. *State*, 555 So. 2d 351 (1989); *Serpa* v. *State*, 555 So. 2d 1210 (1989); *Jones* v. *State*, 559 So. 2d 1096 (1990).

suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit.

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," *California* v. *Hodari D.*, 499 U. S. 621, 628 (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968): "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida* v. *Royer*, 460 U. S. 491 (1983) (plurality opinion), for example, we explained that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.*, at 497; see *id.*, at 523, n. 3 (REHNQUIST, J., dissenting).

There is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure. The Court has dealt with similar encounters in airports and has found them to be "the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest." *Florida* v. *Rodriguez*, 469 U. S. 1, 5–6 (1984). We have stated that even

when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, see *INS* v. *Delgado*, 466 U. S. 210, 216 (1984); *Rodriguez*, *supra*, at 5–6; ask to examine the individual's identification, see *Delgado*, *supra*, at 216; *Royer*, *supra*, at 501 (plurality opinion); *United States* v. *Mendenhall*, 446 U. S. 544, 557–558 (1980); and request consent to search his or her luggage, see *Royer*, *supra*, at 501 (plurality opinion)—as long as the police do not convey a message that compliance with their requests is required.

Bostick insists that this case is different because it took place in the cramped confines of a bus. A police encounter is much more intimidating in this setting, he argues, because police tower over a seated passenger and there is little room to move around. Bostick claims to find support in language from *Michigan* v. *Chesternut*, 486 U. S. 567, 573 (1988), and other cases, indicating that a seizure occurs when a reasonable person would believe that he or she is not "free to leave." Bostick maintains that a reasonable bus passenger would not have felt free to leave under the circumstances of this case because there is nowhere to go on a bus. Also, the bus was about to depart. Had Bostick disembarked, he would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment.

The Florida Supreme Court found this argument persuasive, so much so that it adopted a *per se* rule prohibiting the police from randomly boarding buses as a means of drug interdiction. The state court erred, however, in focusing on whether Bostick was "free to leave" rather than on the principle that those words were intended to capture. When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person

would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Here, for example, the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.

In this respect, the Court's decision in *INS* v. *Delgado*, *supra*, is dispositive. At issue there was the INS' practice of visiting factories at random and questioning employees to determine whether any were illegal aliens. Several INS agents would stand near the building's exits, while other agents walked through the factory questioning workers. The Court acknowledged that the workers may not have been free to leave their worksite, but explained that this was not the result of police activity: "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *Id.*, at 218. We concluded that there was no seizure because, even though the workers were not free to leave the building without being questioned, the agents' conduct should have given employees "no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." *Ibid.*

The present case is analytically indistinguishable from *Delgado*. Like the workers in that case, Bostick's freedom of movement was restricted by a factor independent of police conduct—*i. e.*, by his being a passenger on a bus. Accordingly, the "free to leave" analysis on which Bostick relies is inapplicable. In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. This

formulation follows logically from prior cases and breaks no new ground. We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut*, *supra*, at 569. See also *Hodari D.*, 499 U. S., at 628. Where the encounter takes place is one factor, but it is not the only one. And, as the Solicitor General correctly observes, an individual may decline an officer's request without fearing prosecution. See Brief for United States as *Amicus Curiae* 25. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. See *Delgado*, *supra*, at 216–217; *Royer*, 460 U. S., at 498 (plurality opinion); *Brown* v. *Texas*, 443 U. S. 47, 52–53 (1979).

The facts of this case, as described by the Florida Supreme Court, leave some doubt whether a seizure occurred. Two officers walked up to Bostick on the bus, asked him a few questions, and asked if they could search his bags. As we have explained, no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required. Here, the facts recited by the Florida Supreme Court indicate that the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent.

Nevertheless, we refrain from deciding whether or not a seizure occurred in this case. The trial court made no express findings of fact, and the Florida Supreme Court rested its decision on a single fact—that the encounter took place on a bus—rather than on the totality of the circumstances. We remand so that the Florida courts may evaluate the seizure question under the correct legal standard. We do reject, however, Bostick's argument that he must have been seized

because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the "reasonable person" test presupposes an *innocent* person. See *Royer*, *supra*, at 519, n. 4 (BLACKMUN, J., dissenting) ("The fact that [respondent] knew the search was likely to turn up contraband is of course irrelevant; the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in [his] position"). Accord, *Chesternut*, 486 U. S., at 574 ("This 'reasonable person' standard . . . ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached").

The dissent characterizes our decision as holding that police may board buses and by an "*intimidating* show of authority," *post*, at 447 (emphasis added), demand of passengers their "voluntary" cooperation. That characterization is incorrect. Clearly, a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant *only* if the cooperation is voluntary. "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse. The question to be decided by the Florida courts on remand is whether Bostick chose to permit the search of his luggage.

The dissent also attempts to characterize our decision as applying a lesser degree of constitutional protection to those individuals who travel by bus, rather than by other forms of transportation. This, too, is an erroneous characterization. Our Fourth Amendment inquiry in this case—whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter—applies equally to police encounters that take place on trains, planes, and city streets. It is the dissent that would single out this particu-

lar mode of travel for differential treatment by adopting a *per se* rule that random bus searches are unconstitutional.

The dissent reserves its strongest criticism for the proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions. But this proposition is by no means novel; it has been endorsed by the Court any number of times. *Terry*, *Royer*, *Rodriguez*, and *Delgado* are just a few examples. As we have explained, today's decision follows logically from those decisions and breaks no new ground. Unless the dissent advocates overruling a long, unbroken line of decisions dating back more than 20 years, its criticism is not well taken.

This Court, as the dissent correctly observes, is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs." See *post*, at 440, 450–451. If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime. By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful. The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary. We cannot agree, however, with the Florida Supreme Court that this single factor will be dispositive in every case.

We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to

encounters on a bus. The Florida Supreme Court erred in adopting a *per se* rule.

The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

Our Nation, we are told, is engaged in a "war on drugs." No one disputes that it is the job of law-enforcement officials to devise effective weapons for fighting this war. But the effectiveness of a law-enforcement technique is not proof of its constitutionality. The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method. See *Boyd* v. *United States*, 116 U. S. 616, 625–630 (1886); see also *Harris* v. *United States*, 331 U. S. 145, 171 (1947) (Frankfurter, J., dissenting). In my view, the law-enforcement technique with which we are confronted in this case—the suspicionless police sweep of buses in intrastate or interstate travel—bears all of the indicia of coercion and unjustified intrusion associated with the general warrant. Because I believe that the bus sweep at issue in this case violates the core values of the Fourth Amendment, I dissent.

I

At issue in this case is a "new and increasingly common tactic in the war on drugs": the suspicionless police sweep of buses in interstate or intrastate travel. *United States* v. *Lewis*, 287 U. S. App. D. C. 306, 307, 921 F. 2d 1294, 1295 (1990); see *United States* v. *Flowers*, 912 F. 2d 707, 710 (CA4 1990) (describing technique in Charlotte, North Carolina); *United States* v. *Madison*, 936 F. 2d 90, 91 (CA2 1991) (de-

scribing technique in Port Authority terminal in New York City); *United States* v. *Chandler*, 744 F. Supp. 333, 335 (DC 1990) ("[I]t has become routine to subject interstate travelers to warrantless searches and intimidating interviews while sitting aboard a bus stopped for a short layover in the Capital"); 554 So. 2d 1153, 1156–1157 (Fla. 1989) (describing Florida police policy of "'working the buses'"); see also *ante*, at 431. Typically under this technique, a group of state or federal officers will board a bus while it is stopped at an intermediate point on its route. Often displaying badges, weapons or other indicia of authority, the officers identify themselves and announce their purpose to intercept drug traffickers. They proceed to approach individual passengers, requesting them to show identification, produce their tickets, and explain the purpose of their travels. Never do the officers advise the passengers that they are free not to speak with the officers. An "interview" of this type ordinarily culminates in a request for consent to search the passenger's luggage. See generally *United States* v. *Lewis*, *supra*, at 308, 921 F. 2d, at 1296; *United States* v. *Flowers*, *supra*, at 708–709; *United States* v. *Madison*, *supra*, at 91; 554 So. 2d, at 1154.

These sweeps are conducted in "dragnet" style. The police admittedly act without an "articulable suspicion" in deciding which buses to board and which passengers to approach for interviewing.[1] By proceeding systematically in this

[1] That is to say, the police who conduct these sweeps decline to offer a reasonable, articulable suspicion of criminal wrongdoing sufficient to justify a warrantless "stop" or "seizure" of the confronted passenger. See *Terry* v. *Ohio*, 392 U. S. 1, 20–22, 30–31 (1968); *Florida* v. *Royer*, 460 U. S. 491, 498–499 (1983) (plurality opinion). It does not follow, however, that the approach of passengers during a sweep is completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach. See *United States* v. *Williams*, No. 1:89CR0135 (ND Ohio, June 13, 1989), p. 3 ("Detective Zaller testified that the factors initiating the focus upon the three young black males in this case included: (1) that they were young and black . . . ."), aff'd, No. 89–4083 (CA6, Oct. 19, 1990), p. 7

fashion, the police are able to engage in a tremendously high volume of searches. See, *e. g.*, *Florida* v. *Kerwick*, 512 So. 2d 347, 348–349 (Fla. App. 1987) (single officer employing sweep technique able to search over 3,000 bags in nine-month period). The percentage of successful drug interdictions is low. See *United States* v. *Flowers*, *supra*, at 710 (sweep of 100 buses resulted in seven arrests).

To put it mildly, these sweeps "are inconvenient, intrusive, and intimidating." *United States* v. *Chandler*, 744 F. Supp., at 335. They occur within cramped confines, with officers typically placing themselves in between the passenger selected for an interview and the exit of the bus. See, *e. g.*, *id.*, at 336. Because the bus is only temporarily stationed at a point short of its destination, the passengers are in no position to leave as a means of evading the officers' questioning. Undoubtedly, such a sweep holds up the progress of the bus. See *United States* v. *Fields*, 909 F. 2d 470, 474 n. 2 (CA11 1990); cf. *United States* v. *Rembert*, 694 F. Supp. 163, 175 (WDNC 1988) (reporting testimony of officer that he makes "'every effort in the world not to delay the bus'" but that the driver does not leave terminal until sweep is complete). Thus, this "new and increasingly common tactic," *United States* v. *Lewis*, *supra*, at 307, 921 F. 2d, at 1295, burdens the experience of traveling by bus with a degree of governmental interference to which, until now, our society has been proudly unaccustomed. See, *e. g.*, *State ex rel. Ekstrom* v. *Justice Court*, 136 Ariz. 1, 6, 663 P. 2d 992, 997 (1983) (Feldman, J., concurring) ("The thought that an American can be compelled to 'show his papers' before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals").

(the officers "knew that the couriers, more often than not, were young black males"), vacated and remanded, 500 U. S. 901 (1991). Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.

This aspect of the suspicionless sweep has not been lost on many of the lower courts called upon to review the constitutionality of this practice. Remarkably, the courts located at the heart of the "drug war" have been the most adamant in condemning this technique. As one Florida court put it:

> "'[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'etre*—is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ("that time permits") and check identification [and] tickets, [and] ask to search luggage—all in the name of "voluntary cooperation" with law enforcement . . . .'" 554 So. 2d, at 1158, quoting *State* v. *Kerwick*, *supra*, at 348–349 (quoting trial court order).

The District Court for the District of Columbia spoke in equally pointed words:

> "It seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms."
>
> . . . . .
>
> "The random indiscriminate stopping and questioning of individuals on interstate busses seems to have gone too far. If this Court approves such 'bus stops' and allows prosecutions to be based on evidence seized as a result of such 'stops,' then we will have stripped our

> citizens of basic Constitutional protections. Such action would be inconsistent with what this nation has stood for during its 200 years of existence. If passengers on a bus passing through the Capital of this great nation cannot be free from police interference where there is absolutely no basis for the police officers to stop and question them, then the police will be free to accost people on our streets without any reason or cause. In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America." *United States* v. *Lewis*, 728 F. Supp. 784, 788–789, rev'd, 287 U. S. App. D. C. 306, 921 F. 2d 1294 (1990).

See also *United States* v. *Alexander*, 755 F. Supp. 448, 453 (DC 1991); *United States* v. *Madison*, 744 F. Supp. 490, 495–497 (SDNY 1990), rev'd, 936 F. 2d 90 (CA2 1991); *United States* v. *Chandler*, *supra*, at, 335–336; *United States* v. *Mark*, 742 F. Supp. 17, 18–19 (DC 1990); *United States* v. *Alston*, 742 F. Supp. 13, 15 (DC 1990); *United States* v. *Cothran*, 729 F. Supp. 153, 156–158 (DC 1990), rev'd, 287 U. S. App. D. C. 306, 921 F. 2d 1294 (1990); *United States* v. *Felder*, 732 F. Supp. 204, 209 (DC 1990).

The question for this Court, then, is whether the suspicionless, dragnet-style sweep of buses in intrastate and interstate travel is consistent with the Fourth Amendment. The majority suggests that this latest tactic in the drug war is perfectly compatible with the Constitution. I disagree.

II

I have no objection to the manner in which the majority frames the test for determining whether a suspicionless bus sweep amounts to a Fourth Amendment "seizure." I agree that the appropriate question is whether a passenger who is approached during such a sweep "would feel free to decline the officers' requests or otherwise terminate the encounter."

Ante, at 436. What I cannot understand is how the majority can possibly suggest an affirmative answer to this question.

The majority reverses what it characterizes as the Florida Supreme Court's "*per se* rule" against suspicionless encounters between the police and bus passengers, see *ante*, at 433, 435–440, suggesting only in dictum its "doubt" that a seizure occurred on the facts of this case, see *ante*, at 437. However, the notion that the Florida Supreme Court decided this case on the basis of any "*per se* rule" *independent* of the facts of this case is wholly a product of the majority's imagination. As the majority acknowledges, the Florida Supreme Court "stated explicitly the factual premise for its decision." *Ante*, at 431. This factual premise contained *all* of the details of the encounter between respondent and the police. See 554 So. 2d, at 1154; *ante*, at 431–432. The lower court's analysis of whether respondent was seized drew heavily on these facts, and the court repeatedly emphasized that its conclusion was based on "*all the circumstances*" of this case. 554 So. 2d, at 1157 (emphasis added); see *ibid.* ("*Here, the circumstances indicate* that the officers effectively 'seized' [respondent]" (emphasis added)).

The majority's conclusion that the Florida Supreme Court, contrary to all appearances, *ignored* these facts is based solely on the failure of the lower court to expressly incorporate all of the facts into its reformulation of the certified question on which respondent took his appeal. See *ante*, at 433.[2] The majority never explains the basis of its implausible assumption that the Florida Supreme Court intended its phrasing of the certified question to trump its opinion's careful treatment of the facts in this case. Certainly, when *this* Court issues an opinion, it does not intend lower courts and

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[2] As reformulated, this question read:

"Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?" 554 So. 2d, at 1154.

parties to treat as irrelevant the analysis of facts that the parties neglected to cram into the question presented in the petition for certiorari. But in any case, because the issue whether a seizure has occurred in any given factual setting is a question of law, see *United States* v. *Mendenhall*, 446 U. S. 544, 554–555 (1980) (opinion of Stewart, J.); *United States* v. *Maragh*, 282 U. S. App. D. C. 256, 258–259, 894 F. 2d 415, 417–418 (CADC), cert. denied, 498 U. S. 880 (1990), nothing prevents this Court from deciding on its own whether a seizure occurred based on *all* of the facts of this case as they appear in the opinion of the Florida Supreme Court.

These facts exhibit all of the elements of coercion associated with a typical bus sweep. Two officers boarded the Greyhound bus on which respondent was a passenger while the bus, en route from Miami to Atlanta, was on a brief stop to pick up passengers in Fort Lauderdale. The officers made a visible display of their badges and wore bright green "raid" jackets bearing the insignia of the Broward County Sheriff's Department; one held a gun in a recognizable weapons pouch. See 554 So. 2d, at 1154, 1157. These facts alone constitute an intimidating "show of authority." See *Michigan* v. *Chesternut*, 486 U. S. 567, 575 (1988) (display of weapon contributes to coercive environment); *United States* v. *Mendenhall*, *supra*, at 554 (opinion of Stewart, J.) ("threatening presence of several officers" and "display of a weapon"); *id.*, at 555 (uniformed attire). Once on board, the officers approached respondent, who was sitting in the back of the bus, identified themselves as narcotics officers and began to question him. See 554 So. 2d, at 1154. One officer stood in front of respondent's seat, partially blocking the narrow aisle through which respondent would have been required to pass to reach the exit of the bus. See *id.*, at 1157.

As far as is revealed by facts on which the Florida Supreme Court premised its decision, the officers did not advise respondent that he was free to break off this "interview." Inexplicably, the majority repeatedly stresses the trial court's

implicit finding that the police officers advised respondent that he was free to refuse permission to search his travel bag. See *ante*, at 432, 437–438. This aspect of the exchange between respondent and the police is completely irrelevant to the issue before us. For as the State concedes, and as the majority purports to "accept," *id.*, at 433–434, *if* respondent was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised respondent was of his right to refuse it. See *Florida* v. *Royer*, 460 U. S. 491, 501, 507–508 (1983) (plurality opinion); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Consequently, the issue is not whether a passenger in respondent's position would have felt free to deny consent to the search of his bag, but whether such a passenger—without being apprised of his rights—would have felt free to terminate the antecedent encounter with the police.

Unlike the majority, I have no doubt that the answer to this question is no. Apart from trying to accommodate the officers, respondent had only two options. First, he could have remained seated while obstinately refusing to respond to the officers' questioning. But in light of the intimidating show of authority that the officers made upon boarding the bus, respondent reasonably could have believed that such behavior would only arouse the officers' suspicions and intensify their interrogation. Indeed, officers who carry out bus sweeps like the one at issue here frequently admit that this is the effect of a passenger's refusal to cooperate. See, *e. g.*, *United States* v. *Cothran*, 729 F. Supp., at 156; *United States* v. *Felder*, 732 F. Supp., at 205. The majority's observation that a mere refusal to answer questions, "without more," does not give rise to a reasonable basis for seizing a passenger, *ante*, at 437, is utterly beside the point, because a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him.

Second, respondent could have tried to escape the officers' presence by leaving the bus altogether. But because doing so would have required respondent to squeeze past the gun-wielding inquisitor who was blocking the aisle of the bus, this hardly seems like a course that respondent reasonably would have viewed as available to him.[3] The majority lamely protests that nothing in the stipulated facts shows that the questioning officer "*point[ed]* [his] gu[n] at [respondent] or otherwise *threaten[ed]* him" with the weapon. *Ante*, at 437 (emphasis added). Our decisions recognize the obvious point, however, that the choice of the police to "display" their weapons during an encounter exerts significant coercive pressure on the confronted citizen. *E. g.*, *Michigan* v. *Chesternut*, *supra*, at 575; *United States* v. *Mendenhall*, *supra*, at 554. We have never suggested that the police must go so far as to put a citizen in immediate apprehension of *being shot* before a court can take account of the intimidating effect of being questioned by an officer with weapon in hand.

Even if respondent had perceived that the officers would *let* him leave the bus, moreover, he could not reasonably have been expected to resort to this means of evading their intrusive questioning. For so far as respondent knew, the bus' departure from the terminal was imminent. Unlike a person approached by the police on the street, see *Michigan* v. *Chesternut*, *supra*, or at a bus or airport terminal after reaching his destination, see *United States* v. *Mendenhall*, *supra*, a passenger approached by the police at an intermediate point in a long bus journey cannot simply leave the scene and repair to a safe haven to avoid unwanted probing by law-enforcement officials. The vulnerability that an intrastate or interstate traveler experiences when confronted by the police outside of his "own familiar territory" surely aggravates

[3] As the majority's discussion makes plain, see *ante*, at 432, 437, the officer questioning respondent clearly carried a weapons pouch during the interview. See also 554 So. 2d, at 1157.

the coercive quality of such an encounter. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 247 (1973).

The case on which the majority primarily relies, *INS* v. *Delgado*, 466 U. S. 210 (1984), is distinguishable in every relevant respect. In *Delgado*, this Court held that workers approached by law-enforcement officials inside of a factory were not "seized" for purposes of the Fourth Amendment. The Court was careful to point out, however, that the presence of the agents did not furnish the workers with a reasonable basis for believing that they were not free to leave the factory, as at least some of them did. See *id.*, at 218–219, and n. 7. Unlike passengers confronted by law-enforcement officials on a bus stopped temporarily at an intermediate point in its journey, workers approached by law-enforcement officials at their workplace need not abandon personal belongings and venture into unfamiliar environs in order to avoid unwanted questioning. Moreover, the workers who did not leave the building in *Delgado* remained free to move about the entire factory, see *id.*, at 218, a considerably less confining environment than a bus. Finally, contrary to the officer who confronted respondent, the law-enforcement officials in *Delgado* did not conduct their interviews with guns in hand. See *id.*, at 212.

Rather than requiring the police to justify the coercive tactics employed here, the majority blames respondent for his own sensation of constraint. The majority concedes that respondent "did not feel free to leave the bus" as a means of breaking off the interrogation by the Broward County officers. *Ante*, at 436. But this experience of confinement, the majority explains, "was the natural result of *his* decision to take the bus." *Ibid.* (emphasis added). Thus, in the majority's view, because respondent's "freedom of movement was restricted by a factor independent of police conduct—*i. e.*, by his being a passenger on a bus," *ante*, at 436—respondent was not seized for purposes of the Fourth Amendment.

This reasoning borders on sophism and trivializes the values that underlie the Fourth Amendment. Obviously, a person's "voluntary decision" to place himself in a room with only one exit does not authorize the police to force an encounter upon him by placing themselves in front of the exit. It is no more acceptable for the police to force an encounter on a person by exploiting his "voluntary decision" to expose himself to perfectly legitimate personal or social constraints. By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct suspicionless, dragnet-style sweeps put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this "choice" is no "choice" at all that police engage this technique.

In my view, the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of intrastate or interstate buses. Withdrawing this particular weapon from the government's drug-war arsenal would hardly leave the police without any means of combatting the use of buses as instrumentalities of the drug trade. The police would remain free, for example, to approach passengers whom they have a reasonable, articulable basis to suspect of criminal wrongdoing.[4] Alternatively, they could continue to confront passengers without suspicion so long as they took simple steps, like advising the passengers confronted of their right to decline to be questioned, to dispel the aura of coercion and intimidation that pervades such encounters. There is no reason to expect that such requirements would render the Nation's buses law-enforcement-free zones.

III

The majority attempts to gloss over the violence that today's decision does to the Fourth Amendment with empty admonitions. "If th[e] [war on drugs] is to be fought," the ma-

[4] Insisting that police officers explain their decision to single out a particular passenger for questioning would help prevent their reliance on impermissible criteria such as race. See n. 1, *supra*.

jority intones, "those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime." *Ante*, at 439. The majority's actions, however, speak louder than its words.

I dissent.

GREGORY ET AL., JUDGES *v.* ASHCROFT, GOVERNOR OF MISSOURI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90–50. Argued March 18, 1991—Decided June 20, 1991

Article V, § 26, of the Missouri Constitution provides a mandatory retirement age of 70 for most state judges. Petitioners, judges subject to § 26, were appointed by the Governor and subsequently were retained in office by means of retention elections in which they ran unopposed, subject only to a "yes or no" vote. Along with other state judges, they filed suit against respondent Governor, alleging that § 26 violated the federal Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Protection Clause of the Fourteenth Amendment. The District Court granted the Governor's motion to dismiss, ruling that there was no ADEA violation because Missouri's appointed judges are not covered "employees" within the Act's terms, and that there was no equal protection violation because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. The Court of Appeals affirmed.

Held:

1. Missouri's mandatory retirement requirement for judges does not violate the ADEA. Pp. 456–470.

(a) The authority of a State's people to determine the qualifications of their most important government officials lies "at the heart of representative government," and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV, § 4. See, *e. g.*, *Sugarman* v. *Dougall*, 413 U. S. 634, 648. Because congressional interference with the Missouri people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, Congress must make its intention to do so "unmistakably clear in the language of the statute." See, *e. g.*, *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65. Moreover, where Congress acts pursuant to its Commerce Clause power—as it did in extending the ADEA to the States, see *EEOC* v. *Wyoming*, 460 U. S. 226—the authority of a State's people to determine their government officials' qualifications may be inviolate. Application of the *Will* plain statement rule to determine whether Congress intended the ADEA to apply to state judges may help the Court to avoid a potential constitutional problem. Pp. 457–464.

(b) Appointed state judges are not covered by the ADEA. When it extended the Act's substantive provisions to include the States as employers, Congress redefined "employee" to exclude all elected and most high-ranking state officials, including "appointee[s] on the policymaking level." It is at least ambiguous whether a state judge is such an appointee. Regardless of whether the judge might be considered to make policy in the same sense as executive officials and legislators, the judge certainly is in a position requiring the exercise of discretion concerning issues of public importance, and therefore might be said to be "on the policymaking level." Thus, it cannot be concluded that the ADEA "makes unmistakably clear," *Will*, *supra*, at 65, that appointed state judges are covered. Pp. 464–467.

(c) Even if Congress acted pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, in addition to its Commerce Clause powers, when it extended the ADEA to state employment, the ambiguity in the Act's "employee" definition precludes this Court from attributing to Congress an intent to cover appointed state judges. Although, in *EEOC* v. *Wyoming*, *supra*, at 243, and n. 18, the Court noted that the federalism principles constraining Congress' exercise of its Commerce Clause powers are attenuated when it acts pursuant to its § 5 powers, the Court's political-function cases demonstrate that the Fourteenth Amendment does not override all such principles, see, *e. g.*, *Sugarman*, *supra*, at 648. Of particular relevance here is *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 16, in which the Court established that it will not attribute to Congress an unstated intent to intrude on traditional state authority in the exercise of its § 5 powers. That rule looks much like the plain statement rule applied *supra*, and pertains here in the face of the statutory ambiguity. Pp. 467–470.

2. Missouri's mandatory retirement provision does not violate the Equal Protection Clause. Pp. 470–473.

(a) Petitioners correctly assert their challenge at the rational basis level, since age is not a suspect classification under the Equal Protection Clause, and since they do not claim that they have a fundamental interest in serving as judges. See, *e. g.*, *Vance* v. *Bradley*, 440 U. S. 93, 97. In such circumstances, this Court will not overturn a state constitutional provision unless varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the people's actions in approving it were irrational. *Ibid.* Pp. 470–471.

(b) The Missouri people rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal from office sufficiently inadequate, that they will require all judges to step aside at that age. Because it is an unfortunate fact of life

that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks. Although most judges probably do not suffer significant deterioration at age 70, the people could reasonably conceive the basis for the classification to be true. See *Bradley*, *supra*, at 111. Voluntary retirement will not always be sufficient to serve acceptably the goal of a fully functioning judiciary, nor may impeachment, with its public humiliation and elaborate procedural machinery. The election process may also be inadequate, since most voters never observe judges in action nor read their opinions; since state judges serve longer terms than other officials, making them—deliberately—less dependent on the people's will; and since infrequent retention elections may not serve as an adequate check on judges whose performance is deficient. That other state officials are not subject to mandatory retirement is rationally explained by the facts that their performance is subject to greater public scrutiny, that they are subject to more standard elections, that deterioration in their performance is more readily discernible, and that they are more easily removed than judges. Pp. 471–473.

898 F. 2d 598, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and SOUTER, JJ., joined, and in Parts I and III of which WHITE and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which STEVENS, J., joined, *post*, p. 474. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 486.

Jim J. Shoemake argued the cause for petitioners. With him on the briefs were *Thomas J. Guilfoil* and *Bruce Dayton Livingston*.

James B. Deutsch, Deputy Attorney General of Missouri, argued the cause for respondent. With him on the brief were *William L. Webster*, Attorney General, and *Michael L. Boicourt*, Assistant Attorney General.*

**Cathy Ventrell-Monsees* filed a brief for the American Association of Retired Persons as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Colorado et al. by *Scott Harshbarger*, Attorney General of Massachusetts, *H. Reed Witherby*, Special Assistant Attorney General, and *Thomas A. Barnico*, Assistant Attorney General, and by the Attorneys General for their

JUSTICE O'CONNOR delivered the opinion of the Court.

Article V, § 26, of the Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years." We consider whether this mandatory retirement provision violates the federal Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, 29 U. S. C. §§ 621–634, and whether it comports with the federal constitutional prescription of equal protection of the laws.

I

Petitioners are Missouri state judges. Judge Ellis Gregory, Jr., is an associate circuit judge for the Twenty-first Judicial Circuit. Judge Anthony P. Nugent, Jr., is a judge of the Missouri Court of Appeals, Western District. Both are subject to the § 26 mandatory retirement provision. Petitioners were appointed to office by the Governor of Missouri, pursuant to the Missouri Non-Partisan Court Plan, Mo. Const., Art. V, §§ 25(a)–25(g). Each has, since his appointment, been retained in office by means of a retention election in which the judge ran unopposed, subject only to a "yes or no" vote. See Mo. Const., Art. V, § 25(c)(1).

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respective jurisdictions as follows: *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Warren Price III* of Hawaii, *Hubert H. Humphrey III* of Minnesota, *Donald Stenberg* of Nebraska, *Robert Del Tufo* of New Jersey, *Nicholas J. Spaeth* of North Dakota, *Ernest D. Preate, Jr.*, of Pennsylvania, *Hector Rivera-Cruz* of Puerto Rico, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, and *Joseph B. Meyer* of Wyoming; for the State of Connecticut by *Richard Blumenthal*, Attorney General, and *Arnold B. Feigin* and *Daniel R. Schaefer*, Assistant Attorneys General; for the State of Vermont, Office of Court Administrator, by *William B. Gray;* for the Missouri Bar by *Karen M. Iverson* and *Timothy K. McNamara;* for the National Governors Association et al. by *Richard Ruda, Michael J. Wahoske*, and *Mark B. Rotenberg;* and for the Washington Legal Foundation by *John C. Cozad, W. Dennis Cross, R. Christopher Abele, Daniel J. Popeo*, and *John C. Scully.*

Daniel G. Spraul filed a brief for Judge John W. Keefe as *amicus curiae.*

Petitioners and two other state judges filed suit against John D. Ashcroft, the Governor of Missouri, in the United States District Court for the Eastern District of Missouri, challenging the validity of the mandatory retirement provision. The judges alleged that the provision violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Governor filed a motion to dismiss.

The District Court granted the motion, holding that Missouri's appointed judges are not protected by the ADEA because they are "appointees . . . 'on a policymaking level'" and therefore are excluded from the Act's definition of "employee." App. to Pet. for Cert. 22. The court held also that the mandatory retirement provision does not violate the Equal Protection Clause because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. *Id.*, at 23.

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal. 898 F. 2d 598 (1990). That court also held that appointed judges are "'appointee[s] on the policymaking level,'" and are therefore not covered under the ADEA. *Id.*, at 604. The Court of Appeals held as well that Missouri had a rational basis for distinguishing judges who had reached the age of 70 from those who had not. *Id.*, at 606.

We granted certiorari on both the ADEA and equal protection questions, 498 U. S. 979 (1990), and now affirm.

II

The ADEA makes it unlawful for an "employer" "to discharge any individual" who is at least 40 years old "because of such individual's age." 29 U. S. C. §§ 623(a), 631(a). The term "employer" is defined to include "a State or political subdivision of a State." § 630(b)(2). Petitioners work for the State of Missouri. They contend that the Missouri

mandatory retirement requirement for judges violates the ADEA.

A

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:

> "'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 7 Wall. 700, 725 (1869), quoting *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869).

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987); Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 3–10 (1988).

Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985), quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would

suppress completely "the attempts of the government to establish a tyranny":

> "[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180–181 (C. Rossiter ed. 1961).

James Madison made much the same point:

> "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.*, No. 51, p. 323.

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this "double security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U. S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor* v. *Beckham*, 178 U. S. 548, 570–571 (1900). See also *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen").

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero*, *supra*, at 243. We explained recently:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero*

> *State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); see also *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947) . . . . 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' *United States* v. *Bass*, 404 U. S. 336, 349 (1971)." *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989).

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

In a recent line of authority, we have acknowledged the unique nature of state decisions that "go to the heart of representative government." *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973). *Sugarman* was the first in a series of cases to consider the restrictions imposed by the Equal Protection Clause of the Fourteenth Amendment on the ability of state and local governments to prohibit aliens from public employment. In that case, the Court struck down under the Equal Protection Clause a New York City law that provided a flat ban against the employment of aliens in a wide variety of city jobs. *Ibid.*

The Court did not hold, however, that alienage could never justify exclusion from public employment. We recognized explicitly the States' constitutional power to establish the qualifications for those who would govern:

> "Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth

> Amendment, the power to regulate elections,' *Oregon* v. *Mitchell*, 400 U. S. 112, 124–125 (1970) (footnote omitted) (opinion of Black, J.); see *id.*, at 201 (opinion of Harlan, J.), and *id.*, at 293–294 (opinion of STEWART, J.), "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd* v. *Thayer*, 143 U. S. 135, 161 (1892). See *Luther* v. *Borden*, 7 How. 1, 41 (1849); *Pope* v. *Williams*, 193 U. S. 621, 632–633 (1904). Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' *Dunn* v. *Blumstein*, 405 U. S. [330, 344 (1972)]. And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Ibid.*

We explained that, while the Equal Protection Clause provides a check on such state authority, "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id.*, at 648. This rule "is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. U. S. Const. Art. IV, § 4; U. S. Const. Amdt. X; *Luther* v. *Borden*, *supra;* see *In re Duncan*, 139 U. S. 449, 461 (1891)." *Ibid.*

In several subsequent cases we have applied the "political function" exception to laws through which States exclude aliens from positions "intimately related to the process of democratic self-government." See *Bernal* v. *Fainter*, 467 U. S. 216, 220 (1984). See also *Nyquist* v. *Mauclet*, 432 U. S. 1, 11 (1977); *Foley* v. *Connelie*, 435 U. S. 291, 295–296

(1978); *Ambach* v. *Norwick*, 441 U. S. 68, 73–74 (1979); *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 439–441 (1982). "We have . . . lowered our standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations 'go to the heart of representative government.'" *Bernal*, 467 U. S., at 221 (citations omitted).

These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials.* It is an authority that lies at "'the heart of representative government.'" *Ibid.* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U. S. Const., Art. IV, § 4. See *Sugarman*, *supra*, at 648 (citing the Guarantee Clause and the Tenth Amendment). See also Merritt, 88 Colum. L. Rev., at 50–55.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the Fourteenth Amendment, proscribe certain qualifications; our review of citizenship requirements under the political function exception is less exacting, but it is not absent.

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*JUSTICE WHITE believes that the "political function" cases are inapposite because they involve limitations on "*judicially created* scrutiny" rather than "*Congress'* legislative authority," which is at issue here. *Post*, at 477. He apparently suggests that Congress has greater authority to interfere with state sovereignty when acting pursuant to its Commerce Clause powers than this Court does when applying the Fourteenth Amendment. Elsewhere in his opinion, JUSTICE WHITE emphasizes that the Fourteenth Amendment was designed as an intrusion on state sovereignty. See *post*, at 480. That being the case, our diminished scrutiny of state laws in the "political function" cases, brought under the Fourteenth Amendment, argues strongly for special care when interpreting alleged congressional intrusions into state sovereignty under the Commerce Clause.

Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the Commerce Clause. See *EEOC* v. *Wyoming*, 460 U. S. 226 (1983) (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the Commerce Clause). As against Congress' powers "[t]o regulate Commerce . . . among the several States," U. S. Const., Art. I, §8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (declining to review limitations placed on Congress' Commerce Clause powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, American Constitutional Law §6–25, p. 480 (2d ed. 1988).

B

In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. Pub. L. 93–259, §28(a), 88 Stat. 74, 29 U. S. C. §630(b)(2). At the same time, Congress amended the definition of "employee" to exclude all elected and most high-ranking government officials. Under the Act, as amended:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 29 U. S. C. § 630(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject to retention election. The Governor points to two passages in § 630(f). First, he argues, these judges are selected by an elected official and, because they make policy, are "appointee[s] on the policymaking level."

Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official exception. Thus, the Act excepts elected officials and: (1) "any person chosen by such officer to be on such officer's personal staff"; (2) "an appointee on the policymaking level"; and (3) "an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." Applying the maxim of statutory construction *noscitur a sociis*—that a word is known by the company it keeps—petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official.

Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed "at the policymaking level." The Governor argues that state judges, in fashioning and applying the common law, make policy. Missouri is a

common law state. See Mo. Rev. Stat. § 1.010 (1986) (adopting "[t]he common law of England" consistent with federal and state law). The common law, unlike a constitution or statute, provides no definitive text; it is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community. As Justice Holmes put it:

> "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis." O. Holmes, The Common Law 35–36 (1881).

Governor Ashcroft contends that Missouri judges make policy in other ways as well. The Missouri Supreme Court and Courts of Appeals have supervisory authority over inferior courts. Mo. Const., Art. V, § 4. The Missouri Supreme Court has the constitutional duty to establish rules of practice and procedure for the Missouri court system, and inferior courts exercise policy judgment in establishing local rules of practice. See Mo. Const., Art. V, § 5. The state courts have supervisory powers over the state bar, with the Missouri Supreme Court given the authority to develop disciplinary rules. See Mo. Rev. Stat. §§ 484.040, 484.200–484.270 (1986); Rules Governing the Missouri Bar and the Judiciary (1991).

The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the ap-

pointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, "appointee at the policymaking level," particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Cf. *Dellmuth* v. *Muth*, 491 U. S. 223, 233 (1989) (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an "appointee on the policymaking level."

Governor Ashcroft points also to the "person elected to public office" exception. He contends that because petitioners—although appointed to office initially—are subject to retention election, they are "elected to public office" under the ADEA. Because we conclude that petitioners fall presumptively under the policymaking-level exception, we need not answer this question.

C

The extension of the ADEA to employment by state and local governments was a valid exercise of Congress' pow-

ers under the Commerce Clause. *EEOC* v. *Wyoming*, 460 U. S. 226 (1983). In *Wyoming*, we reserved the questions whether Congress might also have passed the ADEA extension pursuant to its powers under § 5 of the Fourteenth Amendment, and whether the extension would have been a valid exercise of that power. *Id.*, at 243, and n. 18. We noted, however, that the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. *Id.*, at 243, and n. 18, citing *City of Rome* v. *United States*, 446 U. S. 156, 179 (1980). This is because those "Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *Id.*, at 179. One might argue, therefore, that if Congress passed the ADEA extension under its § 5 powers, the concerns about federal intrusion into state government that compel the result in this case might carry less weight.

By its terms, the Fourteenth Amendment contemplates interference with state authority: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14. But this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

We return to the political-function cases. In *Sugarman*, the Court noted that "aliens as a class 'are a prime example of a "discrete and insular" minority (see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938)),' and that classifications based on alienage are 'subject to close judicial scrutiny.'" 413 U. S., at 642, quoting *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971). The *Sugarman* Court held that New York City had insufficient interest in preventing aliens from holding a broad category of public

jobs to justify the blanket prohibition. 413 U. S., at 647. At the same time, the Court established the rule that scrutiny under the Equal Protection Clause "will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Id.*, at 648. Later cases have reaffirmed this practice. See *Foley* v. *Connelie*, 435 U. S. 291 (1978); *Ambach* v. *Norwick*, 441 U. S. 68 (1979); *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982). These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.

Of particular relevance here is *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). The question in that case was whether Congress, in passing a section of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010 (1982 ed.), intended to place an obligation on the States to provide certain kinds of treatment to the disabled. Respondent Halderman argued that Congress passed § 6010 pursuant to § 5 of the Fourteenth Amendment, and therefore that it was mandatory on the States, regardless of whether they received federal funds. Petitioner and the United States, as respondent, argued that, in passing § 6010, Congress acted pursuant to its spending power alone. Consequently, § 6010 applied only to States accepting federal funds under the Act.

The Court was required to consider the "appropriate test for determining when Congress intends to enforce" the guarantees of the Fourteenth Amendment. 451 U. S., at 16. We adopted a rule fully cognizant of the traditional power of the States: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Ibid.* Because Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, we concluded that Congress did not do so. *Ibid.*

The *Pennhurst* rule looks much like the plain statement rule we apply today. In *EEOC* v. *Wyoming*, the Court explained that *Pennhurst* established a rule of statutory construction to be applied where statutory intent is ambiguous. 460 U. S., at 244, n. 18. In light of the ADEA's clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included. In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or §5 of the Fourteenth Amendment.

III

Petitioners argue that, even if they are not covered by the ADEA, the Missouri Constitution's mandatory retirement provision for judges violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioners contend that there is no rational basis for the decision of the people of Missouri to preclude those aged 70 and over from serving as their judges. They claim that the mandatory retirement provision makes two irrational distinctions: between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement.

Petitioners are correct to assert their challenge at the level of rational basis. This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause. See *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 313–314 (1976); *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 441 (1985). Nor do petitioners claim that they have a fundamental interest in serving as judges. The State need therefore assert only a rational basis for its age classification. See *Murgia*, *supra*, at 314; *Bradley*, 440 U. S., at 97. In cases where a classification burdens neither a suspect

group nor a fundamental interest, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws." *Ibid.* In this case, we are dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole. This constitutional provision reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it. See 1976 Mo. Laws 812 (proposing the mandatory retirement provision of § 26); Mo. Const., Art. XII, §§ 2(a), 2(b) (describing the amendment process). "[W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Bradley*, *supra*, at 97. See also *Pennell* v. *San Jose*, 485 U. S. 1, 14 (1988).

Governor Ashcroft cites *O'Neil* v. *Baine*, 568 S. W. 2d 761 (Mo. 1978) (en banc), as a fruitful source of rational bases. In *O'Neil*, the Missouri Supreme Court—to whom Missouri Constitution Article V, § 26, applies—considered an equal protection challenge to a state statute that established a mandatory retirement age of 70 for state magistrate and probate judges. The court upheld the statute, declaring numerous legitimate state objectives it served: "The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system"; "the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; "mandatory retirement increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement"; "such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans." *Id.*, at 766–767. Any one of these explanations is sufficient to rebut the claim

that "the varying treatment of different groups or persons [in § 26] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational." *Bradley*, *supra*, at 97.

The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. See *Bradley*, *supra*, at 111–112; *Murgia*, *supra*, at 315. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary. See Mo. Const., Art. VII, §§ 1–3.

The election process may also be inadequate. Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions. State judges also serve longer terms of office than other public officials, making them—deliberately—less dependent on the will of the people. Compare Mo. Const., Art. V, § 19 (Supreme Court justices and Court of Appeals judges serve 12-year terms; Circuit Court judges 6 years), with Mo. Const., Art. IV, § 17 (Governor, Lieutenant Governor, secretary of state, state treasurer, and attorney general serve 4-year terms) and Mo. Const., Art. III, § 11 (state representatives serve 2-year terms; state senators 4 years). Most of these judges do not run in ordinary elections. See Mo. Const., Art. V, § 25(a). The people of Missouri rationally could conclude that retention elections—in which state judges run unopposed at relatively long intervals—do not serve as an adequate check on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma.

This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials—whose performance is subject to greater public scrutiny, and who are subject to more standard elections—are not. Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed.

The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. But a State "'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Murgia*, 427 U. S., at 316, quoting *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). "In an equal protection case of this type . . . those challenging the . . . judgment [of the people] must convince the court that the . . . facts on which the classification is apparently based could not reasonably be conceived to be true by the . . . decisionmaker." *Bradley*, 440 U. S., at 111. The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70. This classification does not violate the Equal Protection Clause.

IV

The people of Missouri have established a qualification for those who would be their judges. It is their prerogative as citizens of a sovereign State to do so. Neither the ADEA nor the Equal Protection Clause prohibits the choice they have made. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the majority that neither the Age Discrimination in Employment Act of 1967 (ADEA) nor the Equal Protection Clause prohibits Missouri's mandatory retirement provision as applied to petitioners, and I therefore concur in the judgment and in Parts I and III of the majority's opinion. I cannot agree, however, with the majority's reasoning in Part II of its opinion, which ignores several areas of well-established precedent and announces a rule that is likely to prove both unwise and infeasible. That the majority's analysis in Part II is completely unnecessary to the proper resolution of this case makes it all the more remarkable.

I

In addition to petitioners' equal protection claim, we granted certiorari to decide the following question:

> "Whether appointed Missouri state court judges are 'appointee[s] on the policymaking level' within the meaning of the Age Discrimination in Employment Act ('ADEA'), 28 U. S. C. §§ 621–34 (1982 & Supp. V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution." Pet. for Cert. i.

The majority, however, chooses not to resolve that issue of statutory construction. Instead, it holds that whether or not the ADEA can fairly be read to exclude state judges from its scope, "[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Ante*, at 467 (emphasis in original). I cannot agree with this "plain statement" rule because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound.

Among other things, the ADEA makes it "unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U. S. C. § 623(a). In 1974, Congress amended the definition of "employer" in the ADEA to include "a State or political subdivision of a State." § 630(b)(2). With that amendment, "there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States." *EEOC* v. *Wyoming*, 460 U. S. 226, 244, n. 18 (1983).

The dispute in this case therefore is not whether Congress has outlawed age discrimination by the States. It clearly has. The only question is whether petitioners fall within the definition of "employee" in the Act, § 630(f), which contains exceptions for elected officials and certain appointed officials. If petitioners *are* "employee[s]," Missouri's mandatory retirement provision clearly conflicts with the antidiscrimination provisions of the ADEA. Indeed, we have noted that the "policies and substantive provisions of the [ADEA] apply with especial force in the case of mandatory retirement provisions." *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 410 (1985). Pre-emption therefore is automatic, since "state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204 (1983). The majority's federalism concerns are irrelevant to such "actual conflict" pre-emption. "'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Federal Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982), quoting *Free* v. *Bland*, 369 U. S. 663, 666 (1962).

While acknowledging this principle of federal legislative supremacy, see *ante*, at 460, the majority nevertheless im-

poses upon Congress a "plain statement" requirement. The majority claims to derive this requirement from the plain statement approach developed in our Eleventh Amendment cases, see, *e. g.*, *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243 (1985), and applied two Terms ago in *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989). The issue in those cases, however, was whether Congress intended a particular statute to extend to the States *at all*. In *Atascadero*, for example, the issue was whether States could be sued under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794. Similarly, the issue in *Will* was whether States could be sued under 42 U. S. C. § 1983. In the present case, by contrast, Congress has expressly extended the coverage of the ADEA to the States and their employees. Its intention to regulate age discrimination by States is thus "unmistakably clear in the language of the statute." *Atascadero*, *supra*, at 242. See *Davidson* v. *Board of Governors of State Colleges and Universities*, 920 F. 2d 441, 443 (CA7 1990) (ADEA satisfies "clear statement" requirement). The only dispute is over the precise details of the statute's application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so.

The majority also relies heavily on our cases addressing the constitutionality of state exclusion of aliens from public employment. See *ante*, at 461–463, 468–470. In those cases, we held that although restrictions based on alienage ordinarily are subject to strict scrutiny under the Equal Protection Clause, see *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971), the scrutiny will be less demanding for exclusion of aliens "from positions intimately related to the process of democratic self-government." *Bernal* v. *Fainter*, 467 U. S. 216, 220 (1984). This narrow "political-function" exception to the strict-scrutiny standard is based on the "State's historical power to exclude aliens from participation in its

democratic political institutions." *Sugarman* v. *Dougall*, 413 U. S. 634, 648 (1973).

It is difficult to see how the "political-function" exception supports the majority's plain statement rule. First, the exception merely reflects a determination of the scope of the rights of aliens under the Equal Protection Clause. Reduced scrutiny is appropriate for certain political functions because "the right to govern is reserved to citizens." *Foley* v. *Connelie*, 435 U. S. 291, 297 (1978); see also *Sugarman*, *supra*, at 648–649. This conclusion in no way establishes a method for interpreting rights that are statutorily created by Congress, such as the protection from age discrimination in the ADEA. Second, it is one thing to limit *judicially created* scrutiny, and it is quite another to fashion a restraint on *Congress'* legislative authority, as does the majority; the latter is both counter-majoritarian and an intrusion on a coequal branch of the Federal Government. Finally, the majority does not explicitly restrict its rule to "functions that go to the heart of representative government," 413 U. S., at 647, and may in fact be extending it much further to all "state governmental functions." See *ante*, at 470.

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), and *South Carolina* v. *Baker*, 485 U. S. 505 (1988). In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *Id.*, at 512. We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "'traditional,'" "'integral,'" or "'necessary.'" *Garcia*, *supra*, at 546. The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? See *ante*, at 464. Or does it apply more broadly to the regulation of any "state governmental functions"? See *ante*, at 470. Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." See *ante*, at 467. Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities? If so, the majority's rule is completely inconsistent with our pre-emption jurisprudence. See, *e. g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985) (pre-emption will be found where there is a "'clear and manifest *purpose*'" to displace state law) (emphasis added). The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

The imposition of such a burden on Congress is particularly out of place in the context of the ADEA. Congress already has stated that all "individual[s] employed by any employer" are protected by the ADEA unless they are expressly excluded by one of the exceptions in the definition of "employee." See 29 U. S. C. § 630(f). The majority, however, turns the statute on its head, holding that state judges are not protected by the ADEA because "Congress has [not] made it clear that judges are *included*." *Ante*, at 467 (emphasis in original). Cf. *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), where we held that state game wardens are covered by the ADEA, even though such employees are not expressly included within the ADEA's scope.

The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem." *Ante*, at 464. It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in *Garcia* and *Baker*, discussed above. As long as "the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker*, *supra*, at 513. There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being "unduly burden[ed]" by the Federal Government. See *Garcia*, *supra*, at 556. In any event, as discussed below, a straightforward analysis of the ADEA's definition of "employee" reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority's proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority's announcement of its plain statement rule, which purportedly is derived from constitutional principles, *violates* our general practice of avoiding the unnecessary resolution of constitutional issues.

My disagreement with the majority does not end with its unwarranted announcement of the plain statement rule. Even more disturbing is its treatment of Congress' power under § 5 of the Fourteenth Amendment. See *ante*, at 467–470. Section 5 provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Despite that sweeping constitutional delegation of authority to Congress, the majority holds that its plain statement rule will apply with full force to legislation enacted to enforce the Fourteenth Amendment. The majority states: "In the face of . . . ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions *regardless of whether Congress acted pursuant to its*

Commerce Clause powers or § 5 of the Fourteenth Amendment." *Ante*, at 470 (emphasis added).[1]

The majority's failure to recognize the special status of legislation enacted pursuant to § 5 ignores that, unlike Congress' Commerce Clause power, "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 (1976). Indeed, we have held that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome* v. *United States*, 446 U. S. 156, 179 (1980); see also *EEOC* v. *Wyoming*, *supra*, at 243, n. 18.

The majority relies upon *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), see *ante*, at 469–470, but that case does not support its approach. There, the Court merely stated that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U. S., at 16. In other words, the *Pennhurst* presumption was designed only to answer the question whether a particular piece of legisla-

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[1] In *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), we held that the extension of the ADEA to the States was a valid exercise of congressional power under the Commerce Clause. We left open, however, the issue whether it was also a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. Cf. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 453, n. 9 (1976) (extension of Title VII of Civil Rights Act of 1964 to States was pursuant to Congress' § 5 power). Although we need not resolve the issue in this case, I note that at least two Courts of Appeals have held that the ADEA was enacted pursuant to Congress' § 5 power. See *Heiar* v. *Crawford County*, 746 F. 2d 1190, 1193–1194 (CA7 1984); *Ramirez* v. *Puerto Rico Fire Service*, 715 F. 2d 694, 700 (CA1 1983).

tion was enacted pursuant to § 5. That is very different from the majority's apparent holding that even when Congress *is* acting pursuant to § 5, it nevertheless must specify the precise details of its enactment.

The majority's departures from established precedent are even more disturbing when it is realized, as discussed below, that this case can be affirmed based on simple statutory construction.

II

The statute at issue in this case is the ADEA's definition of "employee," which provides:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U. S. C. § 630(f).

A parsing of that definition reveals that it excludes from the definition of "employee" (and thus the coverage of the ADEA) four types of (noncivil service) state and local employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. Like the Court of Appeals, see 898 F. 2d 598, 600 (CA8 1990), I assume that petitioners, who were initially appointed to their positions by the Governor of

Missouri, are "appointed" rather than "elected" within the meaning of the ADEA. For the reasons below, I also conclude that petitioners are "on the policymaking level."[2]

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." Webster's Third New International Dictionary 1754 (1976). Applying that definition, it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them "on the policymaking level." In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and . . . determine present and future decisions." The quotation from Justice Holmes in the majority's opinion, see *ante*, at 466, is an eloquent description of the policymaking nature of the judicial function. Justice Cardozo also stated it well:

> "Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made." B. Cardozo, The Nature of the Judicial Process 113–115 (1921).

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[2] Most of the lower courts that have addressed the issue have concluded that appointed state judges fall within the "appointee[s] on the policymaking level" exception. See 898 F. 2d 598 (CA8 1990) (case below); *EEOC* v. *Massachusetts*, 858 F. 2d 52 (CA1 1988); *Sabo* v. *Casey*, 757 F. Supp. 587 (ED Pa. 1991); *In re Stout*, 521 Pa. 571, 559 A. 2d 489 (1989); see also *EEOC* v. *Illinois*, 721 F. Supp. 156 (ND Ill. 1989). But see *EEOC* v. *Vermont*, 904 F. 2d 794 (CA2 1990); *Schlitz* v. *Virginia*, 681 F. Supp. 330 (ED Va.), rev'd on other grounds, 854 F. 2d 43 (CA4 1988).

Moreover, it should be remembered that the statutory exception refers to appointees "on the policymaking level," not "policymaking employees." Thus, whether or not judges actually *make* policy, they certainly are on the same *level* as policymaking officials in other branches of government and therefore are covered by the exception. The degree of responsibility vested in judges, for example, is comparable to that of other officials that have been found by the lower courts to be on the policymaking level. See, *e. g.*, *EEOC* v. *Reno*, 758 F. 2d 581 (CA11 1985) (assistant state attorney); *EEOC* v. *Board of Trustees of Wayne Cty. Community College*, 723 F. 2d 509 (CA6 1983) (president of community college).

Petitioners argue that the "appointee[s] on the policymaking level" exception should be construed to apply "only to persons who advise or work closely with the elected official that chose the appointee." Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is "sandwiched" between the "personal staff" and "immediate adviser" exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners' premise, however, does not prove their conclusion. It is true that the placement of the "appointee" exception between the "personal staff" and "immediate adviser" exceptions suggests a similarity among the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: The first and third sets have a certain working relationship with elected officials, while the second is *appointed* by elected officials. There is no textual support for concluding that the second set must *also* have a close working relationship with elected officials. Indeed, such a reading would tend to make the "appointee" exception superfluous since the "personal staff" and "immediate adviser" exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of "employee" in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e(f). If anything, that history tends to confirm that the "appointee[s] on the policymaking level" exception was designed to exclude from the coverage of the ADEA all high-level appointments throughout state government structures, including judicial appointments.

For example, during the debates concerning the proposed extension of Title VII to the States, Senator Ervin repeatedly expressed his concern that the (unamended) definition of "employee" would be construed to reach those "persons who exercise the legislative, executive, *and judicial* powers of the States and political subdivisions of the States." 118 Cong. Rec. 1838 (1972) (emphasis added). Indeed, he expressly complained that "[t]here is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over . . . State judges, whether they are elected or appointed to office." *Id.*, at 1677. Also relevant is Senator Taft's comment that, in order to respond to Senator Ervin's concerns, he was willing to agree to an exception not only for elected officials, but also for "those at the top decisionmaking levels in the executive and judicial branch as well." *Id.*, at 1838.

The definition of "employee" subsequently was modified to exclude the four categories of employees discussed above. The Conference Committee that added the "appointee[s] on the policymaking level" exception made clear the separate nature of that exception:

> "It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors *or* to policymaking positions at *the highest levels* of the departments or agencies of State or local governments, such as

cabinet officers, and persons with comparable responsibilities at the local level." H. R. Conf. Rep. No. 92–899, pp. 15–16 (1972) (emphasis added).

The italicized "or" in that statement indicates, contrary to petitioners' argument, that appointed officials need not be advisers to be covered by the exception. Rather, it appears that "Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers." *EEOC* v. *Massachusetts*, 858 F. 2d 52, 56 (CA1 1988). This reading is confirmed by a statement by one of the House Managers, Representative Erlenborn, who explained that "[i]n the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions." 118 Cong. Rec., at 7567.

In addition, the phrase "the highest levels" in the Conference Report suggests that Congress' intent was to limit the exception "down the chain of command, and not so much across agencies or departments." *EEOC* v. *Massachusetts*, 858 F. 2d, at 56. I also agree with the First Circuit's conclusion that even lower court judges fall within the exception because "each judge, as a separate and independent judicial officer, is at the very top of his particular 'policymaking' chain of command, responding . . . only to a higher appellate court." *Ibid.*

For these reasons, I would hold that petitioners are excluded from the coverage of the ADEA because they are "appointee[s] on the policymaking level" under 29 U. S. C. § 630(f).[3]

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[3] The dissent argues that we should defer to the EEOC's view regarding the scope of the "policymaking level" exception. See *post*, at 493–494. I disagree. The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little if any deference. See, *e. g.*, *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204,

I join Parts I and III of the Court's opinion and concur in its judgment.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I agree entirely with the cogent analysis contained in Part I of JUSTICE WHITE's opinion, *ante*, at 474–481. For the reasons well stated by JUSTICE WHITE, the question we must resolve is whether appointed Missouri state judges are excluded from the general *prohibition* of mandatory retirement that Congress established in the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §§ 621–634. I part company with JUSTICE WHITE, however, in his determination that appointed state judges fall within the narrow exclusion from ADEA coverage that Congress created for an "appointee on the policymaking level." § 630(f).

I

For two reasons, I do not accept the notion that an appointed state judge is an "appointee on the policymaking level." First, even assuming that judges may be described as policymakers in certain circumstances, the structure and legislative history of the policymaker exclusion make clear that judges are not the kind of policymakers whom Congress intended to exclude from the ADEA's broad reach. Second,

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212–213 (1988); *St. Agnes Hospital* v. *Sullivan*, 284 U. S. App. D. C. 396, 401, 905 F. 2d 1563, 1568 (1990). Although the dissent does cite to an EEOC decision involving the policymaking exception in Title VII, see *post*, at 494, that decision did not state, even in dicta, that the exception is limited to those who work closely with elected officials. Rather, it merely stated that the exception applies to officials "on the highest levels of state or local government." CCH EEOC Decisions (1983) ¶ 6725. In any event, the EEOC's position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 171 (1989).

whether or not a plausible argument may be made for judges' being policymakers, I would defer to the EEOC's reasonable construction of the ADEA as covering appointed state judges.

A

Although it may be possible to define an appointed judge as a "policymaker" with only a dictionary as a guide,[1] we have an obligation to construe the exclusion of an "appointee on the policymaking level" with a sensitivity to the context in which Congress placed it. In construing an undefined statutory term, this Court has adhered steadfastly to the rule that "'"'words grouped in a list should be given related meaning,'"'" *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990), quoting *Massachusetts* v. *Morash*, 490 U. S. 107, 114–115 (1989), quoting *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 8 (1985), quoting *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 207, 218 (1984), and that "'in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of

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[1] JUSTICE WHITE finds the dictionary definition of "policymaker" broad enough to include the Missouri judges involved in this case, because judges resolve disputes by choosing "'from among alternatives' and elaborate their choices in order 'to guide and . . . determine present and future decisions.'" *Ante*, at 482. See also 898 F. 2d 598, 601 (CA8 1990) (case below), quoting *EEOC* v. *Massachusetts*, 858 F. 2d 52, 55 (CA1 1988). I hesitate to classify judges as policymakers, even at this level of abstraction. Although some part of a judge's task may be to fill in the interstices of legislative enactments, the *primary* task of a judicial officer is to apply rules reflecting the policy choices made by, or on behalf of, those elected to legislative and executive positions. A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators. See *EEOC* v. *Vermont*, 904 F. 2d 794, 800–801 (CA2 1990).

Nor am I persuaded that judges should be considered policymakers because they sometimes fashion court rules and are otherwise involved in the administration of the state judiciary. See *In re Stout*, 521 Pa. 571, 583–586, 559 A. 2d 489, 495–497 (1989). These housekeeping tasks are at most ancillary to a judge's primary function described above.

the whole law, and to its object and policy.'" *Morash*, 490 U. S., at 115, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). Applying these maxims of statutory construction, I conclude that an appointed state judge is not the kind of "policymaker" whom Congress intended to exclude from the protection of the ADEA.

The policymaker exclusion is placed between the exclusion of "any person chosen by such [elected] officer to be on such officer's personal staff" and the exclusion of "an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." See 29 U. S. C. § 630(f). Reading the policymaker exclusion in light of the other categories of employees listed with it, I conclude that the class of "appointee[s] on the policymaking level" should be limited to those officials who share the characteristics of personal staff members and immediate advisers, *i. e.*, those who work closely with the appointing official and are directly accountable to that official. Additionally, I agree with the reasoning of the Second Circuit in *EEOC* v. *Vermont*, 904 F. 2d 794 (1990):

> "Had Congress intended to except a wide-ranging category of policymaking individuals operating wholly independently of the elected official, it would probably have placed that expansive category at the end of the series, not in the middle." *Id.*, at 798.

Because appointed judges are not accountable to the official who appoints them and are precluded from working closely with that official once they have been appointed, they are not "appointee[s] on the policymaking level" for purposes of 29 U. S. C. § 630(f).[2]

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[2] I disagree with JUSTICE WHITE's suggestion that this reading of the policymaking exclusion renders it superfluous. *Ante*, at 483. There exist policymakers who work closely with an appointing official but who are appropriately classified as neither members of his "personal staff" nor "immediate adviser[s] with respect to the exercise of the constitutional or legal powers of the office." Among others, certain members of the Governor's

B

The evidence of Congress' intent in enacting the policymaking exclusion supports this narrow reading. As noted by JUSTICE WHITE, *ante*, at 484, there is little in the legislative history of § 630(f) itself to aid our interpretive endeavor. Because Title VII of the Civil Rights Act of 1964, § 701(f), as amended, 42 U. S. C. § 2000e(f), contains language identical to that in the ADEA's policymaking exclusion, however, we accord substantial weight to the legislative history of the cognate Title VII provision in construing § 630(f). See *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII"). See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985); *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 756 (1979); *EEOC* v. *Vermont*, 904 F. 2d, at 798.

When Congress decided to amend Title VII to include States and local governments as employers, the original bill did not contain any employee exclusion. As JUSTICE WHITE notes, *ante*, at 484, the absence of a provision excluding certain state employees was a matter of concern for Senator Ervin, who commented that the bill, as reported, did not contain a provision "to the effect that the EEOC will not have jurisdiction over . . . State judges, whether they are elected or appointed to office . . . ." 118 Cong. Rec. 1677 (1972). Because this floor comment refers to appointed judges, JUSTICE WHITE concludes that the later amendment containing the exclusion of "an appointee on the policymaking level" was drafted in response to the concerns raised by Senator Ervin and others, *ante*, at 484–485, and therefore should be read to include judges.

Even if the only legislative history available was the above-quoted statement of Senator Ervin and the final

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Cabinet and hign level state agency officials well might be covered by the policymaking exclusion, as I construe it.

amendment containing the policymaking exclusion, I would be reluctant to accept JUSTICE WHITE's analysis. It would be odd to conclude that the general exclusion of those "on the policymaking level" was added in response to Senator Ervin's very specific concern about appointed judges. Surely, if Congress had desired to exclude judges—and was responding to a specific complaint that judges would be within the jurisdiction of the EEOC—it would have chosen far clearer language to accomplish this end.[3] In any case, a more detailed look at the genesis of the policymaking exclusion seriously undermines the suggestion that it was intended to include appointed judges.

After commenting on the absence of an employee exclusion, Senator Ervin proposed the following amendment:

> "[T]he term 'employee' as set forth in the original act of 1964 and as modified by the pending bill shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such person to advise him in respect to the exercise of the constitutional or legal powers of his office." 118 Cong. Rec. 4483 (1972).

Noticeably absent from this proposed amendment is any reference to those on the policymaking level or to judges. Senator Williams then suggested expanding the proposed amendment to include the personal staff of the elected individual, leading Senators Williams and Ervin to engage in the following discussion about the purpose of the amendment:

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[3] The majority acknowledges this anomaly by noting that "'appointee [on] the policymaking level,' particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing." *Ante*, at 467. The majority dismisses this objection not by refuting it, but by noting that "we are not looking for a plain statement that judges are excluded." *Ibid.* For the reasons noted in Part I of JUSTICE WHITE's opinion, this reasoning is faulty; appointed judges are covered unless they fall within the enumerated exclusions.

"Mr. WILLIAMS: . . . .

". . . First, State and local governments are now included under the bill as employers. The amendment would provide, for the purposes of the bill and for the basic law, that an elected individual is not an employee and, th[e]refore, the law could not cover him. The next point is that the elected official would, in his position as an employer, not be covered and would be exempt in the employment of certain individuals.

. . . . .

". . . [B]asically the purpose of the amendment . . . [is] to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers. Is that basically the purpose of the Senator's amendment?

"Mr. ERVIN: I would say to my good friend from New Jersey that that is the purpose of the amendment." *Id.*, at 4492–4493.

Following this exchange, Senator Ervin's amendment was expanded to exclude "any person chosen by such officer to be a personal assistant." *Id.*, at 4493. The Senate adopted these amendments, voting to exclude both personal staff members and immediate advisers from the scope of Title VII.

The policymaker exclusion appears to have arisen from Senator Javits' concern that the exclusion for advisers would sweep too broadly, including hundreds of functionaries such as "lawyers, . . . stenographers, subpena servers, researchers, and so forth." *Id.*, at 4097. Senator Javits asked "to have overnight to check into what would be the status of that rather large group of employees," noting that he "realize[d] that . . . Senator [Ervin was] . . . seeking to confine it to the higher officials in a policymaking or policy advising capacity."

Ibid. In an effort to clarify his point, Senator Javits later stated:

> "The other thing, the immediate advisers, I was thinking more in terms of a cabinet, of a Governor who would call his commissioners a cabinet, or he may have a cabinet composed of three or four executive officials, or five or six, who would do the main and important things. That is what I would define those things expressly to mean." *Id.*, at 4493.

Although Senator Ervin assured Senator Javits that the exclusion of personal staff and advisers affected only the classes of employees that Senator Javits had mentioned, *ibid.*, the Conference Committee eventually adopted a specific exclusion of an "appointee on the policymaking level" as well as the exclusion of personal staff and immediate advisers contained in the Senate bill. In explaining the scope of the exclusion, the conferees stated:

> "It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees[']intent that this exemption shall be construed narrowly." S. Conf. Rep. No. 92–681, pp. 15–16 (1972).

The foregoing history decisively refutes the argument that the policymaker exclusion was added in response to Senator Ervin's concern that appointed state judges would be protected by Title VII. Senator Ervin's own proposed amendment did not exclude those on the policymaking level. Indeed, Senator Ervin indicated that all of the policymakers he sought to have excluded from the coverage of Title VII were encompassed in the exclusion of personal staff and immediate advisers. It is obvious that judges are neither staff nor im-

mediate advisers of any elected official. The only indication as to whom Congress understood to be "appointee[s] on the policymaking level" is Senator Javits' reference to members of the Governor's cabinet, echoed in the Conference Committee's use of "cabinet officers" as an example of the type of appointee at the policymaking level excluded from Title VII's definition of "employee." When combined with the Conference Committee's exhortation that the exclusion be construed narrowly, this evidence indicates that Congress did *not* intend appointed state judges to be excluded from the reach of Title VII or the ADEA.

C

This Court has held that when a statutory term is ambiguous or undefined, a court construing the statute should defer to a reasonable interpretation of that term proffered by the agency entrusted with administering the statute. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). Thus, even were I to conclude that one might read the exclusion of an "appointee on the policymaking level" to include state judges, our precedent would compel me to accept the EEOC's contrary reading of the exclusion if it were a "permissible" interpretation of this ambiguous term. *Id.*, at 843. This Court has recognized that "it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 115 (1988). The EEOC's interpretation of ADEA provisions is entitled to the same deference as its interpretation of analogous provisions in Title VII. See *Oscar Mayer & Co.* v. *Evans*, 441 U. S., at 761, citing *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971).

The EEOC consistently has taken the position that an appointed judge is not an "appointee on the policymaking level" within the meaning of 29 U. S. C. § 630(f). See *EEOC* v. *Vermont*, 904 F. 2d 794 (CA2 1990); *EEOC* v. *Massachusetts*, 858 F. 2d 52 (CA1 1988); *EEOC* v. *Illinois*, 721 F. Supp. 156 (ND Ill. 1989). Relying on the legislative history detailed above, the EEOC has asserted that Congress intended the policymaker exclusion to include only "'an elected official's first line advisers.'" *EEOC* v. *Massachusetts*, 858 F. 2d, at 55. See also CCH EEOC Decisions (1983) ¶6725 (discussing the meaning of the policymaker exclusion under Title VII, and stating that policymakers "must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials"). As is evident from the foregoing discussion, I believe this to be a correct reading of the statute and its history. At a minimum, it is a "permissible" reading of the indisputably ambiguous term "appointee on the policymaking level." Accordingly, I would defer to the EEOC's reasonable interpretation of this term.[4]

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[4] Relying on *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204 (1988), JUSTICE WHITE would conclude that the EEOC's view of the scope of the policymaking exclusion is entitled to "little if any deference" because it is "merely the EEOC's *litigating* position in recent lawsuits." *Ante*, at 485, n. 3. This case is distinguishable from *Bowen*, however, in two important respects. First, unlike in *Bowen*, where the Court declined to defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," 488 U. S., at 212, the EEOC here has issued an administrative ruling construing Title VII's cognate policymaking exclusion that is entirely consistent with the agency's subsequent "litigation position" that appointed judges are not the kind of officials on the policymaking level whom Congress intended to exclude from ADEA coverage. See CCH EEOC Decisions (1983) ¶6725. Second, the Court in *Bowen* emphasized that the agency had failed to offer "a reasoned and consistent view of the scope of" the relevant statute and had proffered an interpretation of the statute that was "contrary to the narrow view of that provision advocated in past cases." See 488 U. S., at 212–213. In contrast, however, the EEOC never has wavered from its view that the

II

The Missouri constitutional provision mandating the retirement of a judge who reaches the age of 70 violates the ADEA and is, therefore, invalid.[5] Congress enacted the ADEA with the express purpose "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621. Congress provided for only limited exclusions from the coverage of the ADEA, and exhorted courts applying this law to construe such exclusions narrowly. The statute's structure and legislative history reveal that Congress did not intend an appointed state judge to be beyond the scope of the ADEA's protective reach. Further, the EEOC, which is charged with the enforcement of the ADEA, has determined that an appointed state judge is covered by the ADEA. This Court's precedent dictates that we defer to the EEOC's permissible interpretation of the ADEA.

I dissent.

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policymaking exclusion does not apply to appointed judges. Thus, this simply is *not* a case in which a court is asked to defer to "nothing more than an agency's convenient litigating position." *Id.*, at 213. For all the reasons that deference was inappropriate in *Bowen*, it is appropriate here.

[5] Because I conclude that the challenged Missouri constitutional provision violates the ADEA, I need not consider petitioners' alternative argument that the mandatory retirement provision violates the Fourteenth Amendment to the United States Constitution. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U. S. 585, 589–590 (1991).

MASSON *v.* NEW YORKER MAGAZINE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89–1799. Argued January 14, 1991—Decided June 20, 1991

Petitioner Masson, a psychoanalyst, became disillusioned with Freudian psychology while serving as projects director of the Sigmund Freud Archives, and was fired after advancing his own theories. Thereafter, respondent Malcolm, an author and contributor to respondent New Yorker Magazine, taped several interviews with Masson and wrote a lengthy article on his relationship with the archives. One of Malcolm's narrative devices consists of enclosing lengthy passages attributed to Masson in quotation marks. Masson allegedly expressed alarm about several errors in those passages before the article was published. After its publication, and with knowledge of Masson's allegations that it contained defamatory material, respondent Alfred A. Knopf, Inc., published the work as a book, which portrayed Masson in a most unflattering light. He brought an action for libel under California law in the Federal District Court, concentrating on passages alleged to be defamatory, six of which are before this Court. In each instance, the quoted statement does not appear in the taped interviews. The parties dispute whether there were additional untaped interviews, the notes from which Malcolm allegedly transcribed. The court granted respondents' motion for summary judgment. It concluded that the alleged inaccuracies were substantially true or were rational interpretations of ambiguous conversations, and therefore did not raise a jury question of actual malice, which is required when libel is alleged by a public figure. The Court of Appeals affirmed. The court found, among other things, that one passage—in which Masson was quoted as saying that archives officials had considered him an "intellectual gigolo" while the tape showed that he said he "was much too junior within the hierarchy of analysis for these important . . . analysts to be caught dead with [him]"—was not defamatory and would not be actionable under the "incremental harm" doctrine.

Held:

1. The evidence presents a jury question whether Malcolm acted with requisite knowledge of falsity or reckless disregard as to the truth or falsity of five of the passages. Pp. 509–525.

(a) As relevant here, the First Amendment limits California's libel law by requiring that a public figure prove by clear and convincing evidence that the defendant published the defamatory statement with

actual malice. However, in place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. Pp. 509–511.

(b) A trier of fact in this case could find that the reasonable reader would understand the quotations attributed to Masson to be nearly verbatim reports of his statements. In general, quotation marks indicate a verbatim reproduction, and quotations add authority to a statement and credibility to an author's work. A fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personal trait or an attitude the speaker does not hold. While some quotations do not convey that the speaker actually said or wrote the quoted material, such is not the case here. Malcolm's work gives the reader no clue that the quotations are anything but the reproductions of actual conversations, and the work was published in a magazine that enjoyed a reputation for scrupulous factual inquiry. These factors could lead a reader to take the quotations at face value. Pp. 511–513.

(c) The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth. Thus, a deliberate alteration of a plaintiff's words does not equate with knowledge of falsity for purposes of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280, and *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341, 342, unless it results in a material change in the statement's meaning. While the use of quotations to attribute words not in fact spoken is important to that inquiry, the idea that any alteration beyond correction of grammar or syntax by itself proves falsity is rejected. Even if a statement has been recorded, the existence of both a speaker and a reporter, the translation between two media, the addition of punctuation, and the practical necessity to edit and make intelligible a speakers' perhaps rambling comments, make it misleading to suggest that a quotation will be reconstructed with complete accuracy. However, if alterations give a different meaning to a speaker's statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable. Pp. 513–518.

(d) Although the Court of Appeals applied a test of substantial truth, it erred in going one step further and concluding that an altered quotation is protected so long as it is a "rational interpretation" of the actual statement. The protection for rational interpretation serves First Amendment principle by allowing an author the interpretive license that is necessary when relying upon ambiguous sources; but where a writer uses a quotation that a reasonable reader would conclude purports to be a verbatim repetition of the speaker's statement, the quota-

tion marks indicate that the author is not interpreting the speaker's ambiguous statement, but is attempting to convey what the speaker said. *Time, Inc.* v. *Pape*, 401 U. S. 279; *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, distinguished. Pp. 518–520.

(e) In determining whether Masson has shown sufficient falsification to survive summary judgment, it must be assumed, except where otherwise evidenced by the tape recordings' transcripts, that he is correct in denying that he made the statements Malcolm attributed to him, and that Malcolm reported with knowledge or reckless disregard of the differences between what he said and what was quoted. Malcolm's typewritten notes should not be considered, since Masson denied making the statements, and since the record contains substantial additional evidence to support a jury determination under a clear and convincing evidence standard that Malcolm deliberately or recklessly altered the quotations. While she contests Masson's allegations, only a trial on the merits will resolve the factual dispute. Pp. 520–521.

(f) Five of the six published passages differ materially in meaning from the tape-recorded statements so as to create an issue of fact for a jury as to falsity. Whether the "intellectual gigolo" passage is defamatory is a question of California law, and to the extent that the Court of Appeals based its conclusion on the First Amendment, it was mistaken. Moreover, an "incremental harm" doctrine—which measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication—is not compelled as a matter of First Amendment protection for speech, since it does not bear on whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. Pp. 521–525.

2. On remand, the Court of Appeals should consider Masson's argument that the District Court erred in granting summary judgment to the New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., on the basis of their respective relations with Malcolm or the lack of any independent actual malice, since the court failed to reach his argument because of its disposition with respect to Malcolm. P. 525.

895 F. 2d 1535, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined, and in Parts I, II–A, II–D, and III–A of which WHITE and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post*, p. 525.

Charles O. Morgan, Jr., argued the cause for petitioner. With him on the briefs was *Paul Richard Kleven.*

H. Bartow Farr III argued the cause for respondents. With him on the brief were *Paul M. Smith, Richard G. Taranto, Charles W. Kenady,* and *Karl Olson.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this libel case, a public figure claims he was defamed by an author who, with full knowledge of the inaccuracy, used quotation marks to attribute to him comments he had not made. The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called "actual malice," a term of art denoting deliberate or reckless falsification. We consider in this opinion whether the attributed quotations had the degree of falsity required to prove this state of mind, so that the public figure can defeat a motion for summary judgment and proceed to a trial on the merits of the defamation claim.

I

Petitioner Jeffrey Masson trained at Harvard University as a Sanskrit scholar, and in 1970 became a professor of Sanskrit & Indian Studies at the University of Toronto. He spent eight years in psychoanalytic training, and qualified as

*Briefs of *amici curiae* urging reversal were filed for Certain Journalists and Academics by *Stewart Abercrombie Baker* and *Michael P. McDonald;* and for the Mountain States Legal Foundation by *William Perry Pendley.*

Briefs of *amici curiae* urging affirmance were filed for the Association of American Publishers, Inc., et al. by *Robert G. Sugarman, R. Bruce Rich, Slade R. Metcalf,* and *Laura R. Handman;* for Home Box Office, Inc., et al. by *P. Cameron DeVore, Daniel M. Waggoner,* and *Ronald E. Guttman;* for the Reporters Committee for Freedom of the Press et al. by *Joseph R. Bankoff, James D. Miller, Jane E. Kirtley, J. Laurent Scharff, W. Terry Maguire, René P. Milam,* and *Bruce W. Sanford;* and for The Time Inc. Magazine Co. et al. by *Roslyn A. Mazer, Paul R. Taskier, Richard M. Schmidt, Jr., Charles S. Sims, Lee Levine, James E. Grossberg,* and *Mark Goodman.*

an analyst in 1978. Through his professional activities, he came to know Dr. Kurt Eissler, head of the Sigmund Freud Archives, and Dr. Anna Freud, daughter of Sigmund Freud and a major psychoanalyst in her own right. The Sigmund Freud Archives, located at Maresfield Gardens outside of London, serves as a repository for materials about Freud, including his own writings, letters, and personal library. The materials, and the right of access to them, are of immense value to those who study Freud and his theories, life, and work.

In 1980, Eissler and Anna Freud hired petitioner as projects director of the archives. After assuming his post, petitioner became disillusioned with Freudian psychology. In a 1981 lecture before the Western New England Psychoanalytical Society in New Haven, Connecticut, he advanced his theories of Freud. Soon after, the board of the archives terminated petitioner as projects director.

Respondent Janet Malcolm is an author and a contributor to respondent The New Yorker, a weekly magazine. She contacted petitioner in 1982 regarding the possibility of an article on his relationship with the archives. He agreed, and the two met in person and spoke by telephone in a series of interviews. Based on the interviews and other sources, Malcolm wrote a lengthy article. One of Malcolm's narrative devices consists of enclosing lengthy passages in quotation marks, reporting statements of Masson, Eissler, and her other subjects.

During the editorial process, Nancy Franklin, a member of the fact-checking department at The New Yorker, called petitioner to confirm some of the facts underlying the article. According to petitioner, he expressed alarm at the number of errors in the few passages Franklin discussed with him. Petitioner contends that he asked permission to review those portions of the article which attributed quotations or information to him, but was brushed off with a never-fulfilled prom-

ise to "get back to [him]." App. 67. Franklin disputes petitioner's version of their conversation. *Id.*, at 246–247.

The New Yorker published Malcolm's piece in December 1983, as a two-part series. In 1984, with knowledge of at least petitioner's general allegation that the article contained defamatory material, respondent Alfred A. Knopf, Inc., published the entire work as a book, entitled In the Freud Archives.

Malcolm's work received complimentary reviews. But this gave little joy to Masson, for the book portrays him in a most unflattering light. According to one reviewer:

> "Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist—mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile—a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession." Coles, Freudianism Confronts Its Malcontents, Boston Globe, May 27, 1984, pp. 58, 60.

Petitioner wrote a letter to the New York Times Book Review calling the book "distorted." In response, Malcolm stated:

> "Many of [the] things Mr. Masson told me (on tape) were discreditable to him, and I felt it best not to include them. Everything I do quote Mr. Masson as saying was said by him, almost word for word. (The 'almost' refers to changes made for the sake of correct syntax.) I would be glad to play the tapes of my conversation with Mr. Masson to the editors of The Book Review whenever they have 40 or 50 short hours to spare." App. 222–223.

Petitioner brought an action for libel under California law in the United States District Court for the Northern District of California. During extensive discovery and repeated

amendments to the complaint, petitioner concentrated on various passages alleged to be defamatory, dropping some and adding others. The tape recordings of the interviews demonstrated that petitioner had, in fact, made statements substantially identical to a number of the passages, and those passages are no longer in the case. We discuss only the passages relied on by petitioner in his briefs to this Court.

Each passage before us purports to quote a statement made by petitioner during the interviews. Yet in each instance no identical statement appears in the more than 40 hours of taped interviews. Petitioner complains that Malcolm fabricated all but one passage; with respect to that passage, he claims Malcolm omitted a crucial portion, rendering the remainder misleading.

(a) "*Intellectual Gigolo.*" Malcolm quoted a description by petitioner of his relationship with Eissler and Anna Freud as follows:

> "'Then I met a rather attractive older graduate student and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room." And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They like me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public. . . .'" In the Freud Archives 38.

The tape recordings contain the substance of petitioner's reference to his graduate student friend, App. 95, but no suggestion that Eissler or Anna Freud considered him, or that he considered himself, an "'intellectual gigolo.'" Instead, petitioner said:

> "They felt, in a sense, I was a private asset but a public liability. . . . They liked me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me." *Id.*, at 104.

(b) "*Sex, Women, Fun.*" Malcolm quoted petitioner as describing his plans for Maresfield Gardens, which he had hoped to occupy after Anna Freud's death:

> "'It was a beautiful house, but it was dark and sombre and dead. Nothing ever went on there. I was the only person who ever came. I would have renovated it, opened it up, brought it to life. Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun. It would have been like the change in *The Wizard of Oz*, from black-and-white into color.'" In the Freud Archives 33.

The tape recordings contain a similar statement, but in place of the references to "sex, women, fun" and The Wizard of Oz, petitioner commented:

> "[I]t is an incredible storehouse. I mean, the library, Freud's library alone is priceless in terms of what it contains: all his books with his annotations in them; the Schreber case annotated, that kind of thing. It's fascinating." App. 127.

Petitioner did talk, earlier in the interview, of his meeting with a London analyst:

> "I like him. So, and we got on very well. That was the first time we ever met and you know, it was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs]—
>
> . . . . .

". . . going to really, we were going to live it up." *Id.*, at 129.

(c) "*It Sounded Better.*" Petitioner spoke with Malcolm about the history of his family, including the reasons his grandfather changed the family name from Moussaieff to Masson, and why petitioner adopted the abandoned family name as his middle name. The article contains the passage:

> "'My father is a gem merchant who doesn't like to stay in any one place too long. His father was a gem merchant, too—a Bessarabian gem merchant, named Moussaieff, who went to Paris in the twenties and adopted the name Masson. My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.'" In the Freud Archives 36.

In the most similar tape-recorded statement, Masson explained at considerable length that his grandfather had changed the family name from Moussaieff to Masson when living in France, "[j]ust to hide his Jewishness." Petitioner had changed his last name back to Moussaieff, but his then-wife Terry objected that "nobody could pronounce it and nobody knew how to spell it, and it wasn't the name that she knew me by." Petitioner had changed his name to Moussaieff because he "just liked it." "[I]t was sort of part of analysis: a return to the roots, and your family tradition and so on." In the end, he had agreed with Terry that "it wasn't her name after all," and used Moussaieff as a middle instead of a last name. App. 87–89.

(d) "*I Don't Know Why I Put It In.*" The article recounts part of a conversation between Malcolm and petitioner about the paper petitioner presented at his 1981 New Haven lecture:

> "[I] asked him what had happened between the time of the lecture and the present to change him from a Freud-

ian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become.

"Masson sidestepped my question. 'You're right, there was nothing disrespectful of analysis in that paper,' he said. 'That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in.'" In the Freud Archives 53.

The tape recordings instead contain the following discussion of the New Haven lecture:

Masson: "So they really couldn't judge the material. And, in fact, until the last sentence I think they were quite fascinated. I think the last sentence was an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts. Uh,—"

Malcolm: "What were the circumstances under which you put it [in]? . . ."

Masson: "That it was, was true.

. . . . . .

". . . I really believe it. I didn't believe anybody would agree with me.

. . . . . .

". . . But I felt I should say something because the paper's still well within the analytic tradition in a sense. . . .

. . . . . .

". . . It's really not a deep criticism of Freud. It contains all the material that would allow one to criticize Freud but I didn't really do it. And then I thought, I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile . . . ." App. 176.

(e) "*Greatest Analyst Who Ever Lived.*" The article contains the following self-explanatory passage:

> "A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux has taken *The Assault on Truth* [Masson's book]. 'Wait till it reaches the best-seller list, and watch how the analysts will crawl,' he crowed. 'They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: "Please take back what you've said about our profession; our patients are quitting." They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now.'" In the Freud Archives 162.

This material does not appear in the tape recordings. Petitioner did make the following statements on related topics in one of the taped interviews with Malcolm:

> ". . . I assure you when that book comes out, which I honestly believe is an honest book, there is nothing, you know, mean-minded about it. It's the honest fruit of research and intellectual toil. And there is not an analyst in the country who will say a single word in favor of it." App. 136.
>
> "Talk to enough analysts and get them right down to these concrete issues and you watch how different it is from my position. It's utterly the opposite and that's finally what I realized, that I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur[t] Eissler and Vic Calef and Brian Bird and Sam

> Lipton against the rest of the world. Not so, it's me. it's me alone." *Id.*, at 139.

The tape of this interview also contains the following exchange between petitioner and Malcolm:

> Masson: ". . . analysis stands or falls with me now."
>
> Malcolm: "Well that's a very grandiose thing to say."
>
> Masson: "Yeah, but it's got nothing to do with me. It's got to do with the things I discovered." *Id.*, at 137.

(f) "*He Had The Wrong Man.*" In discussing the archives' board meeting at which petitioner's employment was terminated, Malcolm quotes petitioner as giving the following explanation of Eissler's attempt to extract a promise of confidentiality:

> "'[Eissler] was always putting moral pressure on me. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? *You're* doing it. *You're* firing me. What am I supposed to do—be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.'" In the Freud Archives 67.

From the tape recordings, on the other hand, it appears that Malcolm deleted part of petitioner's explanation (italicized below), and petitioner argues that the "wrong man" sentence relates to something quite different from Eissler's entreaty that silence was "the honorable thing." In the tape recording, petitioner states:

> "But it was wrong of Eissler to do that, you know. He was constantly putting various kinds of moral pressure on me and, 'Do you want to poison Anna Freud's last days? Have you no heart?' He called me: 'Have you no heart? You're going to kill the poor old woman.

> Have you no heart? Think of what she's done for you and you are now willing to do this to her.' I said, 'What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you?' He said, 'Well you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence.' 'Fuck you,' I said, 'Why should I do that? Why? You know, why should one do that?' 'Because it's the honorable thing to do *and you will save face. And who knows? If you never speak about it and you quietly and humbly accept our judgment, who knows that in a few years if we don't bring you back?'* Well, he had the wrong man." App. 215–216.

Malcolm submitted to the District Court that not all of her discussions with petitioner were recorded on tape, in particular conversations that occurred while the two of them walked together or traveled by car, while petitioner stayed at Malcolm's home in New York, or while her tape recorder was inoperable. She claimed to have taken notes of these unrecorded sessions, which she later typed, then discarding the handwritten originals. Petitioner denied that any discussion relating to the substance of the article occurred during his stay at Malcolm's home in New York, that Malcolm took notes during any of their conversations, or that Malcolm gave any indication that her tape recorder was broken.

Respondents moved for summary judgment. The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that respondents published a defamatory statement with actual malice as defined by our cases. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255–256 (1986). The District Court analyzed each of the passages and held that the alleged inaccuracies did not raise a jury question. The court found that the allegedly fabricated quotations were either substantially true, or were "'one of a number of possi-

ble rational interpretations' of a conversation or event that 'bristled with ambiguities,'" and thus were entitled to constitutional protection. 686 F. Supp. 1396, 1399 (ND Cal. 1987) (quoting *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 512 (1984)). The court also ruled that the "he had the wrong man" passage involved an exercise of editorial judgment upon which the courts could not intrude. 686 F. Supp., at 1403–1404.

The Court of Appeals affirmed, with one judge dissenting. 895 F. 2d 1535 (CA9 1989). The court assumed for much of its opinion that Malcolm had deliberately altered each quotation not found on the tape recordings, but nevertheless held that petitioner failed to raise a jury question of actual malice, in large part for the reasons stated by the District Court. In its examination of the "intellectual gigolo" passage, the court agreed with the District Court that petitioner could not demonstrate actual malice because Malcolm had not altered the substantive content of petitioner's self-description, but went on to note that it did not consider the "intellectual gigolo" passage defamatory, as the quotation merely reported Kurt Eissler's and Anna Freud's opinions about petitioner. In any event, concluded the court, the statement would not be actionable under the "'incremental harm branch' of the 'libel-proof' doctrine," *id.*, at 1541 (quoting *Herbert* v. *Lando*, 781 F. 2d 298, 310–311 (CA2 1986)).

The dissent argued that any intentional or reckless alteration would prove actual malice, so long as a passage within quotation marks purports to be a verbatim rendition of what was said, contains material inaccuracies, and is defamatory. 895 F. 2d, at 1562–1570. We granted certiorari, 498 U. S. 808 (1990), and now reverse.

II

A

Under California law, "[l]ibel is a false and unprivileged publication by writing . . . which exposes any person to ha-

tred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Cal. Civ. Code Ann. § 45 (West 1982). False attribution of statements to a person may constitute libel, if the falsity exposes that person to an injury comprehended by the statute. See *Selleck* v. *Globe International, Inc.*, 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838, 844 (1985); *Cameron* v. *Wernick*, 251 Cal. App. 2d 890, 60 Cal. Rptr. 102 (1967); *Kerby* v. *Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 213, 127 P. 2d 577, 581 (1942); cf. *Baker* v. *Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260–261, 721 P. 2d 87, 90–91 (1986). It matters not under California law that petitioner alleges only part of the work at issue to be false. "[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text," though the California courts recognize that "[w]hile a drop of poison may be lethal, weaker poisons are sometimes diluted to the point of impotency." *Washburn* v. *Wright*, 261 Cal. App. 2d 789, 795, 68 Cal. Rptr. 224, 228 (1968).

The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i. e.*, with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968), or acted with a "high degree of awareness of . . . probable falsity," *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964).

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Cooper-*

ative Publishing Assn., Inc. v. *Bresler*, 398 U. S. 6 (1970). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. See *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 666, n. 7 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

B

In general, quotation marks around a passage indicate to the reader that the passage reproduces the speaker's words verbatim. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions and to assess the conclusions of the author, instead of relying entirely upon the author's characterization of her subject.

A fabricated quotation may injure reputation in at least two senses, either giving rise to a conceivable claim of defamation. First, the quotation might injure because it attributes an untrue factual assertion to the speaker. An example would be a fabricated quotation of a public official admitting he had been convicted of a serious crime when in fact he had not.

Second, regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold. John Lennon once was quoted as saying of

the Beatles, "We're more popular than Jesus Christ now." Time, Aug. 12, 1966, p. 38. Supposing the quotation had been a fabrication, it appears California law could permit recovery for defamation because, even without regard to the truth of the underlying assertion, false attribution of the statement could have injured his reputation. Here, in like manner, one need not determine whether petitioner is or is not the greatest analyst who ever lived in order to determine that it might have injured his reputation to be reported as having so proclaimed.

A self-condemnatory quotation may carry more force than criticism by another. It is against self-interest to admit one's own criminal liability, arrogance, or lack of integrity, and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of statements against interest, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Advisory Committee's Notes on Fed. Rule Evid. 804(b)(3), 28 U. S. C. App., p. 789 (citing *Hileman* v. *Northwest Engineering Co.*, 346 F. 2d 668 (CA6 1965)).

Of course, quotations do not always convey that the speaker actually said or wrote the quoted material. "Punctuation marks, like words, have many uses. Writers often use quotation marks, yet no reasonable reader would assume that such punctuation automatically implies the truth of the quoted material." *Baker* v. *Los Angeles Examiner*, 42 Cal. 3d, at 263, 721 P. 2d, at 92. In *Baker*, a television reviewer printed a hypothetical conversation between a station vice president and writer/producer, and the court found that no reasonable reader would conclude the plaintiff in fact had made the statement attributed to him. *Id.*, at 267, 721 P. 2d, at 95. Writers often use quotations as in *Baker*, and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other

instances, an acknowledgment that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.

The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be nonfiction, the result of numerous interviews. At least a trier of fact could so conclude. The work contains lengthy quotations attributed to petitioner, and neither Malcolm nor her publishers indicate to the reader that the quotations are anything but the reproduction of actual conversations. Further, the work was published in The New Yorker, a magazine which at the relevant time seemed to enjoy a reputation for scrupulous factual accuracy. These factors would, or at least could, lead a reader to take the quotations at face value. A defendant may be able to argue to the jury that quotations should be viewed by the reader as nonliteral or reconstructions, but we conclude that a trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

C

The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.

In some sense, any alteration of a verbatim quotation is false. But writers and reporters by necessity alter what people say, at the very least to eliminate grammatical and syntactical infelicities. If every alteration constituted the falsity required to prove actual malice, the practice of journalism, which the First Amendment standard is designed to protect, would require a radical change, one inconsistent with our precedents and First Amendment principles. Petitioner concedes that this absolute definition of falsity in the quotation context is too stringent, and acknowledges that "minor changes to correct for grammar or syntax" do not amount to falsity for purposes of proving actual malice. Brief for Petitioner 18, 36–37. We agree, and must determine what, in addition to this technical falsity, proves falsity for purposes of the actual malice inquiry.

Petitioner argues that, excepting correction of grammar or syntax, publication of a quotation with knowledge that it does not contain the words the public figure used demonstrates actual malice. The author will have published the quotation with knowledge of falsity, and no more need be shown. Petitioner suggests that by invoking more forgiving standards the Court of Appeals would permit and encourage the publication of falsehoods. Petitioner believes that the intentional manufacture of quotations does not "represen[t] the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies," *Bose Corp.*, 466 U. S., at 513, and that protection of deliberate falsehoods would hinder the First Amendment values of robust and well-informed public debate by reducing the reliability of information available to the public.

We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. An interviewer who writes from notes often will engage in the task of attempting a reconstruction of the speaker's statement. That author would, we may assume,

act with knowledge that at times she has attributed to her subject words other than those actually used. Under petitioner's proposed standard, an author in this situation would lack First Amendment protection if she reported as quotations the substance of a subject's derogatory statements about himself.

Even if a journalist has tape-recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy. The use or absence of punctuation may distort a speaker's meaning, for example, where that meaning turns upon a speaker's emphasis of a particular word. In other cases, if a speaker makes an obvious misstatement, for example by unconscious substitution of one name for another, a journalist might alter the speaker's words but preserve his intended meaning. And conversely, an exact quotation out of context can distort meaning, although the speaker did use each reported word.

In all events, technical distinctions between correcting grammar and syntax and some greater level of alteration do not appear workable, for we can think of no method by which courts or juries would draw the line between cleaning up and other changes, except by reference to the meaning a statement conveys to a reasonable reader. To attempt narrow distinctions of this type would be an unnecessary departure from First Amendment principles of general applicability, and, just as important, a departure from the underlying purposes of the tort of libel as understood since the latter half of the 16th century. From then until now, the tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false. See

Milkovich v. *Lorain Journal Co.*, 497 U. S. 1, 11 (1990). As we have recognized, "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974). If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.

These essential principles of defamation law accommodate the special case of inaccurate quotations without the necessity for a discrete body of jurisprudence directed to this subject alone. Last Term, in *Milkovich* v. *Lorain Journal Co.*, we refused "to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" 497 U. S., at 18 (citation omitted). We recognized that "expressions of 'opinion' may often imply an assertion of objective fact." *Ibid.* We allowed the defamation action to go forward in that case, holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters. So too in the case before us, we reject any special test of falsity for quotations, including one which would draw the line at correction of grammar or syntax. We conclude, rather, that the exceptions suggested by petitioner for grammatical or syntactical corrections serve to illuminate a broader principle.

The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts § 563, Comment *c* (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 776 (5th ed. 1984). It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the

charge be proved true, irrespective of slight inaccuracy in the details." 5 B. Witkin, Summary of California Law § 495 (9th ed. 1988) (citing cases). In this case, of course, the burden is upon petitioner to prove falsity. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 775 (1986). The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." *Heuer* v. *Kee*, 15 Cal. App. 2d 710, 714, 59 P. 2d 1063, 1064 (1936); see also *Alioto* v. *Cowles Communications, Inc.*, 623 F. 2d 616, 619 (CA9 1980); *Maheu* v. *Hughes Tool Co.*, 569 F. 2d 459, 465–466 (CA9 1978). Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, Libel, Slander, and Related Problems 138 (1980); see, *e. g.*, *Wehling* v. *Columbia Broadcasting System*, 721 F. 2d 506, 509 (CA5 1983); see generally R. Smolla, Law of Defamation § 5.08 (1991). Our definition of actual malice relies upon this historical understanding.

We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co.* v. *Sullivan*, 376 U. S., at 279–280, and *Gertz* v. *Robert Welch, Inc.*, *supra*, at 342, unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.

Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. Meaning is the life of language. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning. In the case under consideration, readers of In the Freud Archives may have found Malcolm's portrait of petitioner espe-

cially damning because so much of it appeared to be a self-portrait, told by petitioner in his own words. And if the alterations of petitioner's words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable.

D

The Court of Appeals applied a test of substantial truth which, in exposition if not in application, comports with much of the above discussion. The Court of Appeals, however, went one step beyond protection of quotations that convey the meaning of a speaker's statement with substantial accuracy and concluded that an altered quotation is protected so long as it is a "rational interpretation" of an actual statement, drawing this standard from our decisions in *Time, Inc.* v. *Pape*, 401 U. S. 279 (1971), and *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984). Application of our protection for rational interpretation in this context finds no support in general principles of defamation law or in our First Amendment jurisprudence. Neither *Time, Inc.* v. *Pape* nor *Bose Corp.* involved the fabrication of quotations, or any analogous claim, and because many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory, we cannot accept the reasoning of the Court of Appeals on this point.

In *Time, Inc.* v. *Pape*, we reversed a libel judgment which arose out of a magazine article summarizing a report by the United States Commission on Civil Rights discussing police civil rights abuses. The article quoted the Commission's summary of the facts surrounding an incident of police brutality, but failed to include the Commission's qualification that these were allegations taken from a civil complaint. The Court noted that "the attitude of the Commission toward the factual verity of the episodes recounted was anything but straightforward," and distinguished between a "direct ac-

count of events that speak for themselves," 401 U. S., at 285, 286, and an article descriptive of what the Commission had reported. *Time, Inc.* v. *Pape* took into account the difficult choices that confront an author who departs from direct quotation and offers his own interpretation of an ambiguous source. A fair reading of our opinion is that the defendant did not publish a falsification sufficient to sustain a finding of actual malice.

In *Bose Corp.*, a Consumer Reports reviewer had attempted to describe in words the experience of listening to music through a pair of loudspeakers, and we concluded that the result was not an assessment of events that speak for themselves, but "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." 466 U. S., at 512 (quoting *Time, Inc.* v. *Pape*, *supra*, at 290). We refused to permit recovery for choice of language which, though perhaps reflecting a misconception, represented "the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." 466 U. S., at 513.

The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources. Where, however, a writer uses a quotation, and where a reasonable reader would conclude that the quotation purports to be a verbatim repetition of a statement by the speaker, the quotation marks indicate that the author is not involved in an interpretation of the speaker's ambiguous statement, but attempting to convey what the speaker said. This orthodox use of a quotation is the quintessential "direct account of events that speak for themselves." *Time, Inc.* v. *Pape*, *supra*, at 285. More accurately, the quotation allows the subject to speak for himself.

The significance of the quotations at issue, absent any qualification, is to inform us that we are reading the state-

ment of petitioner, not Malcolm's rational interpretation of what petitioner has said or thought. Were we to assess quotations under a rational interpretation standard, we would give journalists the freedom to place statements in their subjects' mouths without fear of liability. By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. Newsworthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice. We doubt the suggestion that as a general rule readers will assume that direct quotations are but a rational interpretation of the speaker's words, and we decline to adopt any such presumption in determining the permissible interpretations of the quotations in question here.

III

A

We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S., at 255. So we must assume, except where otherwise evidenced by the transcripts of the tape recordings, that petitioner is correct in denying that he made the statements attributed to him by Malcolm, and that Malcolm reported with knowledge or reckless disregard of the differences between what petitioner said and what was quoted.

Respondents argue that, in determining whether petitioner has shown sufficient falsification to survive summary judgment, we should consider not only the tape-recorded statements but also Malcolm's typewritten notes. We must decline that suggestion. To begin with, petitioner affirms in an affidavit that he did not make the complained of statements. The record contains substantial additional evidence, moreover, evidence which, in a light most favorable to petitioner, would support a jury determination under a clear and convincing standard that Malcolm deliberately or recklessly altered the quotations.

First, many of the challenged passages resemble quotations that appear on the tapes, except for the addition or alteration of certain phrases, giving rise to a reasonable inference that the statements have been altered. Second, Malcolm had the tapes in her possession and was not working under a tight deadline. Unlike a case involving hot news, Malcolm cannot complain that she lacked the practical ability to compare the tapes with her work in progress. Third, Malcolm represented to the editor in chief of The New Yorker that all the quotations were from the tape recordings. Fourth, Malcolm's explanations of the time and place of unrecorded conversations during which petitioner allegedly made some of the quoted statements have not been consistent in all respects. Fifth, petitioner suggests that the progression from typewritten notes, to manuscript, then to galleys provides further evidence of intentional alteration. Malcolm contests petitioner's allegations, and only a trial on the merits will resolve the factual dispute. But at this stage, the evidence creates a jury question whether Malcolm published the statements with knowledge or reckless disregard of the alterations.

B

We must determine whether the published passages differ materially in meaning from the tape-recorded statements so as to create an issue of fact for a jury as to falsity.

(a) "*Intellectual Gigolo.*" We agree with the dissenting opinion in the Court of Appeals that "[f]airly read, intellectual gigolo suggests someone who forsakes intellectual integrity in exchange for pecuniary or other gain." 895 F. 2d, at 1551. A reasonable jury could find a material difference between the meaning of this passage and petitioner's tape-recorded statement that he was considered "much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him]."

The Court of Appeals majority found it difficult to perceive how the "intellectual gigolo" quotation was defamatory, a determination supported not by any citation to California law, but only by the argument that the passage appears to be a report of Eissler's and Anna Freud's opinions of petitioner. *Id.*, at 1541. We agree with the Court of Appeals that the most natural interpretation of this quotation is not an admission that petitioner considers himself an intellectual gigolo but a statement that Eissler and Anna Freud considered him so. It does not follow, though, that the statement is harmless. Petitioner is entitled to argue that the passage should be analyzed as if Malcolm had reported falsely that *Eissler* had given this assessment (with the added level of complexity that the quotation purports to represent petitioner's understanding of Eissler's view). An admission that two well-respected senior colleagues considered one an "intellectual gigolo" could be as, or more, damaging than a similar self-appraisal. In all events, whether the "intellectual gigolo" quotation is defamatory is a question of California law. To the extent that the Court of Appeals based its conclusion in the First Amendment, it was mistaken.

The Court of Appeals relied upon the "incremental harm" doctrine as an alternative basis for its decision. As the court explained it: "This doctrine measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." *Ibid.*; see generally Note, 98 Harv. L.

Rev. 1909 (1985); R. Smolla, Law of Defamation § 9.10[4][d] (1991). The court ruled, as a matter of law, that "[g]iven the . . . many provocative, bombastic statements indisputably made by Masson and quoted by Malcolm, the additional harm caused by the 'intellectual gigolo' quote was nominal or nonexistent, rendering the defamation claim as to this quote nonactionable." 895 F. 2d, at 1541.

This reasoning requires a court to conclude that, in fact, a plaintiff made the other quoted statements, cf. *Liberty Lobby, Inc.* v. *Anderson*, 241 U. S. App. D. C. 246, 251, 746 F. 2d 1563, 1568 (1984), vacated and remanded on other grounds, 477 U. S. 242 (1986), and then to undertake a factual inquiry into the reputational damage caused by the remainder of the publication. As noted by the dissent in the Court of Appeals, the most "provocative, bombastic statements" quoted by Malcolm are those complained of by petitioner, and so this would not seem an appropriate application of the incremental harm doctrine. 895 F. 2d, at 1566.

Furthermore, the Court of Appeals provided no indication whether it considered the incremental harm doctrine to be grounded in California law or the First Amendment. Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so. Of course, state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation.

(b) "*Sex, Women, Fun.*" This passage presents a closer question. The "sex, women, fun" quotation offers a very different picture of petitioner's plans for Maresfield Gardens

than his remark that "Freud's library alone is priceless." See *supra*, at 503. Petitioner's other tape-recorded remarks did indicate that he and another analyst planned to have great parties at the Freud house and, in a context that may not even refer to Freud house activities, to "pass women on to each other." We cannot conclude as a matter of law that these remarks bear the same substantial meaning as the quoted passage's suggestion that petitioner would make the Freud house a place of "sex, women, fun."

(c) "*It Sounded Better.*" We agree with the District Court and the Court of Appeals that any difference between petitioner's tape-recorded statement that he "just liked" the name Moussaieff, and the quotation that "it sounded better" is, in context, immaterial. Although Malcolm did not include all of petitioner's lengthy explanation of his name change, she did convey the gist of that explanation: Petitioner took his abandoned family name as his middle name. We agree with the Court of Appeals that the words attributed to petitioner did not materially alter the meaning of his statement.

(d) "*I Don't Know Why I Put It In.*" Malcolm quotes petitioner as saying that he "tacked on at the last minute" a "totally gratuitous" remark about the "sterility of psychoanalysis" in an academic paper, and that he did so for no particular reason. In the tape recordings, petitioner does admit that the remark was "possibly [a] gratuitously offensive way to end a paper to a group of analysts," but when asked why he included the remark, he answered "[because] it was true . . . I really believe it." Malcolm's version contains material differences from petitioner's statement, and it is conceivable that the alteration results in a statement that could injure a scholar's reputation.

(e) "*Greatest Analyst Who Ever Lived.*" While petitioner did, on numerous occasions, predict that his theories would do irreparable damage to the practice of psychoanalysis, and did suggest that no other analyst shared his views, no tape-recorded statement appears to contain the substance or the

arrogant and unprofessional tone apparent in this quotation. A material difference exists between the quotation and the tape-recorded statements, and a jury could find that the difference exposed petitioner to contempt, ridicule, or obloquy.

(f) *"He Had The Wrong Man."* The quoted version makes it appear as if petitioner rejected a plea to remain in stoic silence and do "the honorable thing." The tape-recorded version indicates that petitioner rejected a plea supported by far more varied motives: Eissler told petitioner that not only would silence be "the honorable thing," but petitioner would "save face," and might be rewarded for that silence with eventual reinstatement. Petitioner described himself as willing to undergo a scandal in order to shine the light of publicity upon the actions of the Freud Archives, while Malcolm would have petitioner describe himself as a person who was "the wrong man" to do "the honorable thing." This difference is material, a jury might find it defamatory, and, for the reasons we have given, there is evidence to support a finding of deliberate or reckless falsification.

C

Because of the Court of Appeals' disposition with respect to Malcolm, it did not have occasion to address petitioner's argument that the District Court erred in granting summary judgment to The New Yorker Magazine, Inc., and Alfred A. Knopf, Inc., on the basis of their respective relations with Malcolm or the lack of any independent actual malice. These questions are best addressed in the first instance on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I join Parts I, II–A, II–D, and III–A, but cannot wholly agree with the remainder of the opinion. My principal dis-

agreement is with the holding, *ante*, at 517, that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."

Under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), "malice" means deliberate falsehood or reckless disregard for whether the fact asserted is true or false. *Id.*, at 279–280. As the Court recognizes, the use of quotation marks in reporting what a person said asserts that the person spoke the words as quoted. As this case comes to us, it is to be judged on the basis that in the instances identified by the Court, the reporter, Malcolm, wrote that Masson said certain things that she knew Masson did not say. By any definition of the term, this was "knowing falsehood": Malcolm asserts that Masson said these very words, knowing that he did not. The issue, as the Court recognizes, is whether Masson spoke the words attributed to him, not whether the fact, if any, asserted by the attributed words is true or false. In my view, we need to go no further to conclude that the defendants in this case were not entitled to summary judgment on the issue of malice with respect to any of the six erroneous quotations.

That there was at least an issue for the jury to decide on the question of deliberate or reckless falsehood does not mean that plaintiffs were necessarily entitled to go to trial. If, as a matter of law, reasonable jurors could not conclude that attributing to Masson certain words that he did not say amounted to libel under California law, *i. e.*, "expose[d] [Masson] to hatred, contempt, ridicule, or obloquy, or which cause[d] him to be shunned or avoided, or which ha[d] a tendency to injure him in his occupation," Cal. Civ. Code Ann. § 45 (West 1982), a motion for summary judgment on this ground would be justified.* I would suppose, for example,

*In dealing with the "intellectual gigolo" passage, the Court of Appeals ruled that there was no malice but in the alternative went on to say that as a matter of law the erroneous attribution was not actionable defamation. 895 F. 2d 1535, 1540–1541 (CA9 1989).

that if Malcolm wrote that Masson said that he wore contact lenses, when he said nothing about his eyes or his vision, the trial judge would grant summary judgment for the defendants and dismiss the case. The same would be true if Masson had said "I was spoiled as a child by my Mother," whereas, Malcolm reports that he said "I was spoiled as a child by my parents." But if reasonable jurors could conclude that the deliberate misquotation was libelous, the case should go to the jury.

This seems to me to be the straightforward, traditional approach to deal with this case. Instead, the Court states that deliberate misquotation does not amount to *New York Times* malice unless it results in a material change in the meaning conveyed by the statement. This ignores the fact that, under *New York Times*, reporting a known falsehood—here the knowingly false attribution—is sufficient proof of malice. The falsehood, apparently, must be substantial; the reporter may lie a little, but not too much.

This standard is not only a less manageable one than the traditional approach, but it also assigns to the courts issues that are for the jury to decide. For a court to ask whether a misquotation substantially alters the meaning of spoken words in a defamatory manner is a far different inquiry from whether reasonable jurors could find that the misquotation was different enough to be libelous. In the one case, the court is measuring the difference from its own point of view; in the other it is asking how the jury would or could view the erroneous attribution.

The Court attempts to justify its holding in several ways, none of which is persuasive. First, it observes that an interviewer who takes notes of any interview will attempt to reconstruct what the speaker said and will often knowingly attribute to the subject words that were not used by the speaker. *Ante*, at 514–515. But this is nothing more than an assertion that authors may misrepresent because they cannot remember what the speaker actually said. This

should be no dilemma for such authors, for they could report their story without purporting to quote when they are not sure, thereby leaving the reader to trust or doubt the author rather than believing that the subject actually said what he is claimed to have said. Moreover, this basis for the Court's rule has no application where there is a tape of the interview and the author is in no way at a loss to know what the speaker actually said. Second, the Court speculates that even with the benefit of a recording, the author will find it necessary at times to reconstruct, *ante*, at 515, but again, in those cases why should the author be free to put his or her reconstruction in quotation marks, rather than report without them? Third, the Court suggests that misquotations that do not materially alter the meaning inflict no injury to reputation that is compensable as defamation. *Ante*, at 517. This may be true, but this is a question of defamation or not, and has nothing to do with whether the author deliberately put within quotation marks and attributed to the speaker words that the author knew the speaker did not utter.

As I see it, the defendants' motion for summary judgment based on lack of malice should not have been granted on any of the six quotations considered by the Court in Part III–B of its opinion. I therefore dissent from the result reached with respect to the "*It Sounded Better*" quotation dealt with in paragraph (c) of Part III–B, but agree with the Court's judgment on the other five misquotations.

JAMES B. BEAM DISTILLING CO. *v.* GEORGIA ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 89–680. Argued October 30, 1990—Decided June 20, 1991

Before 1985, Georgia law imposed an excise tax on imported liquor at a rate double that imposed on liquor manufactured from Georgia-grown products. In 1984, this Court, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, held that a similar Hawaii law violated the Commerce Clause. Petitioner, a manufacturer of Kentucky bourbon, thereafter filed an action in Georgia state court, seeking a refund of taxes it paid under Georgia's law for 1982, 1983, and 1984. The court declared the statute unconstitutional, but refused to apply its ruling retroactively, relying on *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, which held that a decision will be applied prospectively where it displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. The State Supreme Court affirmed.

Held: The judgment is reversed, and the case is remanded.

259 Ga. 363, 382 S. E. 2d 95, reversed and remanded.

JUSTICE SOUTER, joined by JUSTICE STEVENS, concluded that once this Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. Pp. 534–544.

(a) Whether a new rule should apply retroactively is in the first instance a matter of choice of law, to which question there are three possible answers. The first and normal practice is to make a decision fully retroactive. Second, there is the purely prospective method of overruling, where the particular case is decided under the old law but announces the new, effective with respect to all conduct occurring after the date of that decision. Finally, the new rule could be applied in the case in which it is pronounced, but then return to the old one with respect to all others arising on facts predating the pronouncement. The possibility of such modified, or selective, prospectivity was abandoned in the criminal context in *Griffith* v. *Kentucky*, 479 U. S. 314, 328. Pp. 534–538.

(b) Because *Bacchus* did not reserve the question, and remanded the case for consideration of remedial issues, it is properly understood to have followed the normal practice of applying its rule retroactively to the litigants there before the Court. Pp. 538–540.

(c) Because *Bacchus* thus applied its own rule, principles of equality and *stare decisis* require that it be applied to the litigants in this case. *Griffith*'s equality principle, that similarly situated litigants should be treated the same, applies equally well in the civil context as in the criminal. Of course, retroactivity is limited by the need for finality, since equality for those whose claims have been adjudicated could only be purchased at the expense of the principle that there be an end of litigation. In contrast, parties, such as petitioner, who wait to litigate until after others have labored to create a new rule, are merely asserting a right that is theirs in law, is not being applied on a prospective basis only, and is not otherwise barred by state procedural requirements. Modified prospectivity rejected, a new rule may not be retroactively applied to some litigants when it is not applied to others. This necessarily limits the application of the *Chevron Oil* test, to the effect that it may not distinguish between litigants for choice-of-law purposes on the particular equities of their claims to prospectivity. It is the nature of precedent that the substantive law will not shift and spring on such a basis. Pp. 540–544.

(d) This opinion does not speculate as to the bounds or propriety of pure prospectivity. Nor does it determine the appropriate remedy in this case, since remedial issues were neither considered below nor argued to this Court. P. 544.

JUSTICE WHITE concluded that, under any one of several suppositions, the opinion in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, may reasonably be read to extend the benefits of the judgment in that case to Bacchus Imports and that petitioner here should also have the benefit of *Bacchus*. If the Court in *Bacchus* thought that its decision was not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. The Court in that case may also have thought that retroactivity was proper under the factors set forth in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97. And, even if the Court was wrong in applying *Bacchus* retroactively, there is no precedent in civil cases for applying a new rule to the parties of the case but not to others. Moreover, *Griffith* v. *Kentucky*, 479 U. S. 314, 328, has overruled such a practice in criminal cases and should be followed on the basis of *stare decisis*. However, the propriety of pure prospectivity is settled in this Court's prior cases, see, *e. g.*, *Cipriano* v. *City of Houma*, 395 U. S. 701, 706, which recognize that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. To allow for the possibility of speculation as to the propriety of such prospectivity is to suggest that there may come a time when this Court's precedents on the issue will be overturned. Pp. 544–547.

JUSTICE BLACKMUN, joined by JUSTICE MARSHALL and JUSTICE SCALIA, concluded that prospectivity, whether "selective" or "pure," breaches the Court's obligation to discharge its constitutional function in articulating new rules for decision, which must comport with its duty to decide only cases and controversies. *Griffith* v. *Kentucky*, 479 U. S. 314. The nature of judicial review constrains the Court to require retroactive application of each new rule announced. Pp. 547–548.

JUSTICE SCALIA, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, while agreeing with JUSTICE SOUTER's conclusion, disagreed that the issue is one of choice of law, and concluded that both selective and pure prospectivity are impermissible, not for reasons of equity, but because they are not permitted by the Constitution. To allow the Judiciary powers greater than those conferred by the Constitution, as the fundamental nature of those powers was understood when the Constitution was enacted, would upset the division of federal powers central to the constitutional scheme. Pp. 548–549.

SOUTER, J., announced the judgment of the Court, and delivered an opinion, in which STEVENS, J., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 544. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL and SCALIA, JJ., joined, *post*, p. 547. SCALIA, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 548. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 549.

Morton Siegel argued the cause for petitioner. With him on the briefs were *John L. Taylor, Jr.*, and *Richard Schoenstadt*.

Amelia Waller Baker, Assistant Attorney General of Georgia, argued the cause for respondents. With her on the brief were *Michael J. Bowers*, Attorney General, *H. Perry Michael*, Executive Assistant Attorney General, *Harrison Kohler*, Deputy Attorney General, *Daniel M. Formby*, Senior Assistant Attorney General, and *Warren R. Calvert*, Assistant Attorney General.*

*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, *Gail Starling Marshall*, Deputy Attorney General, and *Peter W. Low*, joined by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Robert*

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS joins.

The question presented is whether our ruling in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), should apply retroactively to claims arising on facts antedating that decision. We hold that application of the rule in that case requires its application retroactively in later cases.

I

Prior to its amendment in 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. See Ga. Code Ann. § 3–4–60 (1982). In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held in *Bacchus* to violate the Commerce Clause. *Bacchus*, 468 U. S., at 273. It proved no bar to our finding of unconstitutionality that the discriminatory tax involved intoxicating liquors, with respect to which the States have heightened

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K. Corbin of Arizona, *Steve Clark* of Arkansas, *Duane Woodard* of Colorado, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Robert J. Del Tufo* of New Jersey, *Robert Abrams* of New York, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, and *Don Hanaway* of Wisconsin; for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard F. Finn*, Supervising Deputy Attorney General, and *Eric J. Coffill*, *Clarine Nardi Riddle*, Attorney General of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, *James T. Jones*, Attorney General of Idaho, *Frank J. Kelley*, Attorney General of Michigan, *Robert M. Spire*, Attorney General of Nebraska, *Hal Stratton*, Attorney General of New Mexico, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *R. Paul Van Dam*, Attorney General of Utah, *Kenneth O. Eikenberry*, Attorney General of Washington, *Roger W. Thompkins*, Attorney General of West Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Herbert O. Reid, Sr.*; and for the Council of State Governments et al. by *Charles Rothfeld* and *Benna Ruth Solomon*.

regulatory powers under the Twenty-first Amendment. *Id.*, at 276.

In *Bacchus*' wake, petitioner James B. Beam Distilling Co., a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law likewise inconsistent with the Commerce Clause, and sought a refund of $2.4 million, representing not only the differential taxation but the full amount it had paid under § 3–4–60 for the years 1982, 1983, and 1984. Georgia's Department of Revenue failed to respond to the request, and Beam thereafter brought a refund action against the State in the Superior Court of Fulton County. On cross-motions for summary judgment, the trial court agreed that § 3–4–60 could not withstand a *Bacchus* attack for the years in question, and that the tax had therefore been unconstitutional. Using the analysis described in this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), the court nonetheless refused to apply its ruling retroactively. It therefore denied petitioner's refund request.

The Supreme Court of Georgia affirmed the trial court in both respects. The court held the pre-1985 version of the statute to have violated the Commerce Clause as, in its words, an act of "simple economic protectionism." See 259 Ga. 363, 364, 382 S. E. 2d 95, 96 (1989) (citing *Bacchus*). But it, too, applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the statute unconstitutional for the years in question. The court concluded that but for *Bacchus* its decision on the constitutional question would have established a new rule of law by overruling past precedent, see *Scott* v. *State*, 187 Ga. 702, 2 S. E. 2d 65 (1939) (upholding predecessor to § 3–4–60 against Commerce Clause objection), upon which the litigants may justifiably have relied. See 259 Ga., at 365, 382 S. E. 2d, at 96. That reliance, together with the "unjust results" that would follow from retroactive application, was thought by the court to satisfy the *Chevron Oil* test for prospectivity. To the dissenting argument of two justices

that a statute found unconstitutional is unconstitutional *ab initio*, the court observed that while it had "'declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, . . . those decisions are not applicable to the present controversy, as the original . . . statute, when adopted, was not violative of the Constitution under court interpretations of that period.'" 259 Ga., at 366, 382 S. E. 2d, at 97 (quoting *Adams* v. *Adams*, 249 Ga. 477, 478–479, 291 S. E. 2d 518, 520 (1982)).

Beam sought a writ of certiorari from the Court on the retroactivity question.[1] We granted the petition, 496 U. S. 924 (1990), and now reverse.

II

In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. See Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 60 (1965). Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.

It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is

[1] Although petitioner expends some effort, see Brief for Petitioner 5–8, in asserting the unconstitutionality under *Bacchus* of the Georgia law as amended, see Ga. Code Ann. § 3–4–60 (1990), an argument rejected by the Georgia Supreme Court in *Heublein, Inc.* v. *State*, 256 Ga. 578, 351 S. E. 2d 190 (1987), that issue is neither before us nor relevant to the issue that is.

properly seen in the first instance as a matter of choice of law, "a choice . . . between the principle of forward operation and that of relation backward." *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). Once a rule is found to apply "backward," there may then be a further issue of remedies, *i. e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 210 (1990) (STEVENS, J., dissenting). But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise. See *Smith*, *supra*, at 177–178 (plurality opinion); cf. *United States* v. *Estate of Donnelly*, 397 U. S. 286, 297, n. (1970) (Harlan, J., concurring).

As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, see *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (1910) (Holmes, J., dissenting), and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. See *Mackey* v. *United States*, 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, see *Smith*, *supra*, at 201 (SCALIA, J., concurring in judgment); *Linkletter* v. *Walker*, 381 U. S. 618, 622–623 (1965), according to which the courts

are understood only to find the law, not to make it. But in some circumstances retroactive application may prompt difficulties of a practical sort. However much it comports with our received notions of the judicial role, the practice has been attacked for its failure to take account of reliance on cases subsequently abandoned, a fact of life if not always one of jurisprudential recognition. See, *e. g.*, *Mosser* v. *Darrow*, 341 U. S. 267, 276 (1951) (Black, J., dissenting).

Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision. This Court has, albeit infrequently, resorted to pure prospectivity, see *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982); *Buckley* v. *Valeo*, 424 U. S. 1, 142–143 (1976); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964); see also *Smith*, *supra*, at 221, n. 11 (STEVENS, J., dissenting); *Linkletter*, *supra*, at 628, although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision. See *Smith*, *supra*, at 210 (STEVENS, J., dissenting). This approach claims justification in its appreciation that "[t]he past cannot always be erased by a new judicial declaration," *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940); see also *Lemon* v. *Kurtzman*, 411 U. S. 192, 199 (1973) (plurality opinion), and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures. See *United States* v. *Johnson*, 457 U. S. 537, 554–555

(1982); *James* v. *United States*, 366 U. S. 213, 225 (1961) (Black, J., dissenting).

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. See, *e. g.*, *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967); *Daniel* v. *Louisiana*, 420 U. S. 31 (1975); see also *Smith*, *supra*, at 198 ("During the period in which much of our retroactivity doctrine evolved, most of the Court's new rules of criminal procedure had expanded the protections available to criminal defendants"). On the one hand, full retroactive application of holdings such as those announced in *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); and *Katz* v. *United States*, 389 U. S. 347 (1967), would have "seriously disrupt[ed] the administration of our criminal laws [,] . . . requir[ing] the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson*, *supra*, at 731. On the other hand, retroactive application could hardly have been denied the litigant in the law-changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.

But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. See R. Wasserstrom, The Judicial Decision 69–72 (1961). "We depart from this basic judicial tradi-

tion when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Desist* v. *United States*, 394 U. S. 244, 258–259 (1969) (Harlan, J., dissenting); see also Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 425 (1924). For this reason, we abandoned the possibility of selective prospectivity in the criminal context in *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987), even where the new rule constituted a "clear break" with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review. Though *Griffith* was held not to dispose of the matter of civil retroactivity, see *id.*, at 322, n. 8, selective prospectivity appears never to have been endorsed in the civil context. *Smith*, 496 U. S., at 200 (plurality opinion). This case presents the issue.

III

Both parties have assumed the applicability of the *Chevron Oil* test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear) where a decision displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. See *Chevron Oil*, 404 U. S., at 106–107. But we have never employed *Chevron Oil* to the end of modified civil prospectivity.

The issue is posed by the scope of our disposition in *Bacchus*. In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying. Although the taxpaying appellants prevailed on the merits of their Commerce Clause claim, however, the *Bacchus* Court did not grant outright their request for a refund of taxes paid under the law found unconstitutional. Instead, we remanded the case for consideration of the State's arguments that appellants were "not entitled to refunds since they did

not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay." *Bacchus*, 468 U. S., at 276–277. "These refund issues, . . . essentially issues of remedy," had not been adequately developed on the record nor passed upon by the state courts below, and their consideration may have been intertwined with, or obviated by, matters of state law. *Id.*, at 277.

Questions of remedy aside, *Bacchus* is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court. Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, cf. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 297–298 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), it is properly understood to have followed the normal rule of retroactive application in civil cases. If the Court were to have found prospectivity as a choice-of-law matter, there would have been no need to consider the pass-through defense; if the Court had reserved the issue, the terms of the remand to consider "remedial" issues would have been incomplete. Indeed, any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court. See *McKesson*, 496 U. S., at 46–49 (pass-through defense considered as remedial question). Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided.[2] See also *Williams* v.

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[2] In fact, the state defendant in *Bacchus* argued for pure prospectivity under the criteria set forth in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). See Brief for Appellee in *Bacchus Imports Ltd.* v. *Dias*, O. T. 1983, No. 82–1565, p. 19. It went on to argue that *"even if"* the challenged tax were held invalid *and* the decision were not limited to prospective application, the challengers should not be entitled to refunds because

Vermont, 472 U. S. 14, 28 (1985); *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983); cf. *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817 (1989).

Bacchus thus applied its own rule, just as if it had reversed and remanded without further ado, and yet of course the Georgia courts refused to apply that rule with respect to the litigants in this case. Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a *Chevron Oil* analysis.

Griffith cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See *Estate of Donnelly*, 397 U. S., at 296 (Harlan, J., concurring). Its strength is in fact greater in the latter sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See *Griffith*, *supra*, at 331–332 (WHITE, J., dissenting). Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. *Teague* v. *Lane*, 489 U. S. 288 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

Nor is selective prospectivity necessary to maintain incentives to litigate in the civil context as it may have been in the criminal before *Griffith*'s rule of absolute retroactivity. In the civil context, "even a party who is deprived of the full ret-

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any taxes paid would have been passed through to consumers. *Id.*, at 46. Though unnecessary to our ruling here, the prospectivity issue can thus be said actually to have been litigated and by implication actually to have been decided by the Court by the fact of its consideration of the pass-through defense. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747–748, n. 3 (1990).

roactive benefit of a new decision may receive some relief." *Smith*, 496 U. S., at 198–199. Had the appellants in *Bacchus* lost their bid for retroactivity, for example, they would nonetheless have won protection from the future imposition of discriminatory taxes, and the same goes for the petitioner here. Assuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases; its possibility is therefore unlikely to deter the broad class of prospective challengers of civil precedent. See generally Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201, 215 (1965).

Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? It is also objected that in civil cases unlike criminal there is more potential for litigants to freeload on those without whose labor the new rule would never have come into being. (Criminal defendants are already potential litigants by virtue of their offense, and invoke retroactivity only by way of defense; civil beneficiaries of new rules may become litigants as a result of the law change alone, and use it as a weapon.) That is true of the petitioner now before us, which did not challenge the Georgia law until after its fellow liquor distributors had won their battle in *Bacchus*. To apply the rule of *Bacchus* to the parties in that case but not in this one would not, therefore, provoke Justice Harlan's attack on modified prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a

stream of similar cases to flow by unaffected by that new rule." *Mackey*, 401 U. S., at 679 (opinion concurring in judgments in part and dissenting in part); see also *Smith*, *supra*, at 214–215 (STEVENS, J., dissenting). Beam had yet to enter the waters at the time of our decision in *Bacchus*, and yet we give it *Bacchus*' benefit. Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.

As to the former, independent interests are at stake; and with respect to the latter, the distinction would be too readily and unnecessarily overcome. While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. "'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 401 (1981) (quoting *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time. As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant. We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, it is

enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. See *Simpson* v. *Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 681 F. 2d 81, 85–86 (CA1 1982), cert. denied *sub nom. Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 459 U. S. 1127 (1983); see also Note, 1985 U. Ill. L. Rev. 117, 131–132. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we

say here precludes consideration of individual equities when deciding remedial issues in particular cases.

IV

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, 468 U. S., at 277. Nothing we say here deprives respondents of their opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U. S., at 296 (Harlan, J., concurring); cf. *Lemon*, 411 U. S., at 203.

The judgment is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

I agree with JUSTICE SOUTER that the opinion in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), may reasonably be read as extending the benefit of the judgment in that case to the appellant Bacchus Imports. I also agree that the decision is to be applied to other litigants whose cases were not final at the time of the *Bacchus* decision. This would be true under any one of several suppositions. First, if the Court in that case thought its decision to have been reasonably fore-

seeable and hence not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), would not then have been implicated. Second, even if retroactivity depended upon consideration of the *Chevron Oil* factors, the Court may have thought that retroactive application was proper. Here, it should be noted that although the dissenters in *Bacchus*—including JUSTICE O'CONNOR—argued that the Court erred in deciding the Twenty-first Amendment issue against the State, they did not argue that the Court erred in giving the appellant the benefit of its decision. *Bacchus*, *supra*, at 278 (STEVENS, J., dissenting). Third, even if—as JUSTICE O'CONNOR now argues—the Court was quite wrong in doing so, *post*, at 553–559, that is water over the dam, irretrievably it seems to me. There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated,* and *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987), having overruled such a practice in criminal cases (a decision from which I dissented and still believe wrong, but which I now follow on the basis of *stare decisis*), I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports did. Hence I concur in the judgment of the Court.

Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. See, *e. g.*, *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969). This

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*See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 88 (1982); *Buckley* v. *Valeo*, 424 U. S. 1, 142–143 (1976); *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 572 (1969); *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 24–25 (1964); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 422 (1964); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940).

was what Justice Stewart wrote for the Court in *Chevron Oil*, summarizing what was deemed to be the essence of those cases. *Chevron Oil*, *supra*, at 105–109. This was also what JUSTICE O'CONNOR wrote for the plurality in *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167 (1990). I joined that opinion and would not depart from it. Nor, without overruling *Chevron Oil* and those other cases before and after *Chevron Oil*, holding that certain decisions will be applied prospectively only, can anyone sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system.

Hence, I do not understand how JUSTICE SOUTER can cite the cases on prospective operation, *ante*, at 536–537, and yet say that he need not speculate as to the propriety of pure prospectivity, *ante*, at 544. The propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions. To nevertheless "speculate" about the issue is only to suggest that there may come a time when our precedents on the issue will be overturned.

Plainly enough, JUSTICES SCALIA, MARSHALL, and BLACKMUN would depart from our precedents. JUSTICE SCALIA would do so for two reasons, as I read him. *Post*, p. 548. First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. Second, JUSTICE SCALIA, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

I am quite unpersuaded by this line of reasoning and hence concur in the judgment on the narrower ground employed by JUSTICE SOUTER.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE SCALIA join, concurring in the judgment.

I join JUSTICE SCALIA's opinion because I agree that failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication. It seems to me that our decision in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), makes clear that this Court's function in articulating new rules of decision must comport with its duty to decide only "Cases" and "Controversies." See U. S. Const., Art. III, §2, cl. 1. Unlike a legislature, we do not promulgate new rules to "be applied prospectively only," as the dissent, *post*, at 550, and perhaps JUSTICE SOUTER, would have it. The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a Government of limited powers.

I do not read JUSTICE SCALIA's comments on the division of federal powers to reject the idea expressed so well by the last Justice Harlan that selective application of new rules violates the principle of treating similarly situated defendants the same. See *Mackey* v. *United States*, 401 U. S. 667, 678–679 (1971), and *Desist* v. *United States*, 394 U. S. 244, 258–259 (1969) (dissenting opinion), on which *Griffith* relied. This rule, which we have characterized as a question of equity, is not the remedial equity that the dissent seems to believe can trump the role of adjudication in our constitutional scheme. See *post*, at 550–551. It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still

come to court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.

Application of new decisional rules does not thwart the principles of *stare decisis*, as the dissent suggests. See *post*, at 552. The doctrine of *stare decisis* profoundly serves important purposes in our legal system. Nearly a half century ago, Justice Roberts cautioned: "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 113 (1944) (dissenting opinion). The present dissent's view of *stare decisis* would rob the doctrine of its vitality through eliminating the tension between the current controversy and the new rule. By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.

Like JUSTICE SCALIA, I conclude that prospectivity, whether "selective" or "pure," breaches our obligation to discharge our constitutional function.

JUSTICE SCALIA, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

I think I agree, as an abstract matter, with JUSTICE SOUTER's reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls "selective prospectivity" is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "[t]he Executive power" may be familiar to other legal systems, but is alien to our own. So also, I think, "[t]he judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power "to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses "difficulties of a . . . practical sort," *ante*, at 536, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial lawmaking; to eliminate them is to render courts substantially more free to "make new law," and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.

For this reason, and not reasons of equity, I would find both "selective prospectivity" and "pure prospectivity" beyond our power.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

The Court extends application of the new rule announced in *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), retroactively to all parties, without consideration of the analysis

described in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). JUSTICE SOUTER bases this determination on "principles of equality and *stare decisis*." *Ante*, at 540. To my mind, both of these factors lead to precisely the opposite result.

JUSTICE BLACKMUN and JUSTICE SCALIA concur in the judgment of the Court but would abrogate completely the *Chevron Oil* inquiry and hold that all decisions must be applied retroactively in all cases. I explained last Term that such a rule ignores well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases. See *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 188–200 (plurality opinion). There is no need to repeat that discussion here. I reiterate, however, that precisely because this Court has "the power 'to say what the law is,' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)," *ante*, at 549 (SCALIA, J., concurring in judgment), when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. *Chevron Oil* describes our long-established procedure for making this inquiry.

I

I agree that the Court in *Bacchus* applied its rule retroactively to the parties before it. The *Bacchus* opinion is silent on the retroactivity question. Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.

The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. JUSTICE SOUTER today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies

a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone. I disagree. Without a determination that retroactivity is appropriate under *Chevron Oil*, neither equality nor *stare decisis* leads to this result.

As to "equality," JUSTICE SOUTER believes that it would be unfair to withhold the benefit of the new rule in *Bacchus* to litigants similarly situated to those who received the benefit in that case. *Ante*, at 537–538, 540. If JUSTICE SOUTER is concerned with fairness, he cannot ignore *Chevron Oil;* the purpose of the *Chevron Oil* test is to determine the equities of retroactive application of a new rule. See *Chevron Oil*, *supra*, at 107–108; *American Trucking*, *supra*, at 191. Had the *Bacchus* Court determined that retroactivity would be appropriate under *Chevron Oil*, or had this Court made that determination now, retroactive application would be fair. Where the *Chevron Oil* analysis indicates that retroactivity is not appropriate, however, just the opposite is true. If retroactive application was inequitable in *Bacchus* itself, the Court only hinders the cause of fairness by repeating the mistake. Because I conclude that the *Chevron Oil* test dictates that *Bacchus* not be applied retroactively, I would decline the Court's invitation to impose liability on every jurisdiction in the Nation that reasonably relied on pre-*Bacchus* law.

JUSTICE SOUTER also explains that "*stare decisis*" compels his result. *Ante*, at 540. By this, I assume he means that the retroactive application of the *Bacchus* rule to the parties in that case is itself a decision of the Court to which the Court should now defer in deciding the retroactivity question in this case. This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis of the issue. This tells us nothing about how this case—where the *Chevron Oil* question is squarely presented—should come out.

Contrary to JUSTICE SOUTER's assertions, *stare decisis* cuts the other way in this case. At its core, *stare decisis* al-

lows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law. See *American Trucking*, 496 U. S., at 197 (plurality opinion) ("[P]rospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding"); *id.*, at 205 (SCALIA, J., concurring in judgment) (imposition of retroactive liability on a litigant would "*upset that litigant's settled expectations* because the earlier decision for which *stare decisis* effect is claimed . . . overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists"). If a *Chevron Oil* analysis reveals, as it does, that retroactive application of *Bacchus* would unjustly undermine settled expectations, *stare decisis* dictates strongly against JUSTICE SOUTER's holding.

JUSTICE SOUTER purports to have restricted the application of *Chevron Oil* only to a limited extent. *Ante*, at 543. The effect appears to me far greater. JUSTICE SOUTER concludes that the *Chevron Oil* analysis, if ignored in answering the narrow question of retroactivity as to the parties to a particular case, must be ignored also in answering the far broader question of retroactivity as to all other parties. But it is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach of a new rule, the greater the potential disruption of settled expectations. The inquiry the Court summarized in *Chevron Oil* represents longstanding doctrine on the application of nonretroactivity to civil cases. See *American Trucking*, *supra*, at 188–200. JUSTICE SOUTER today ignores this well-established precedent and seriously curtails the *Chevron Oil* inquiry. His reliance upon *stare decisis* in reaching this conclusion becomes all the more ironic.

II

Faithful to this Court's decisions, the Georgia Supreme Court in this case applied the analysis described in *Chevron Oil* in deciding the retroactivity question before it. Subsequently, this Court has gone out of its way to ignore that analysis. A proper application of *Chevron Oil* demonstrates, however, that *Bacchus* should not be applied retroactively.

Chevron Oil describes a three-part inquiry in determining whether a decision of this Court will have prospective effect only:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U. S., at 106–107 (citations and internal quotation marks omitted).

Bacchus easily meets the first criterion. That case considered a Hawaii excise tax on alcohol sales that exempted certain locally produced liquor. The Court held that the tax, by discriminating in favor of local products, violated the Commerce Clause, U. S. Const., Art. I, §8, cl. 3, by interfering with interstate commerce. 468 U. S., at 273. The Court rejected the State's argument that any violation of ordinary Commerce Clause principles was, in the case of alcohol sales, overborne by the State's plenary powers under §2 of the

Twenty-first Amendment to the United States Constitution. That section provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Court noted that language in some of our earlier opinions indicated that § 2 did indeed give the States broad power to establish the terms under which imported liquor might compete with domestic. See 468 U. S., at 274, and n. 13. Nonetheless, the Court concluded that other cases had by then established that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.*, at 275. Relying on *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964), *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984), the Court concluded that § 2 did not protect the State from liability for economic protectionism. 468 U. S., at 275–276.

The Court's conclusion in *Bacchus* was unprecedented. Beginning with *State Board of Equalization of California* v. *Young's Market Co.*, 299 U. S. 59 (1936), an uninterrupted line of authority from this Court held that States need not meet the strictures of the so-called "dormant" or "negative" Commerce Clause when regulating sales and importation of liquor within the State. *Young's Market* is directly on point. There, the Court rejected precisely the argument it eventually accepted in *Bacchus*. The California statute at issue in *Young's Market* imposed a license fee for the privilege of importing beer into the State. The Court concluded that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege" because doing so directly burdens interstate commerce. 299 U. S., at 62. Section 2 changed all of that. The Court answered appellees' assertion that § 2 did not ab-

rogate negative Commerce Clause restrictions. The contrast between this discussion and the Court's rule in *Bacchus* is stark:

> "[Appellees] request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.
>
> "The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *Id.*, at 62–63.

Numerous cases following *Young's Market* are to the same effect, recognizing the States' broad authority to regulate commerce in intoxicating beverages unconstrained by negative Commerce Clause restrictions. See, *e. g.*, *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 299 (1945); *Joseph B. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 42 (1966); *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 283–284 (1972); see generally *Bacchus*, *supra*, at 281–282 (STEVENS, J., dissenting).

The cases that the *Bacchus* Court cited in support of its new rule in fact provided no notice whatsoever of the impending change. *Idlewild*, *Midcal*, and *Capital Cities*, *supra*, all involved States' authority to regulate the sale and importa-

tion of alcohol when doing so conflicted directly with legislation passed by Congress pursuant to its powers under the Commerce Clause. The Court in each case held that §2 did not give States the authority to override congressional legislation. These essentially were Supremacy Clause cases; in that context, the Court concluded that the Twenty-first Amendment had not "repealed" the Commerce Clause. See *Idlewild*, *supra*, at 331–332; *Midcal*, *supra*, at 108–109; *Capital Cities*, *supra*, at 712–713.

These cases are irrelevant to *Bacchus* because they involved the relation between §2 and Congress' authority to legislate under the (positive) Commerce Clause. *Bacchus* and the *Young's Market* line concerned States' authority to regulate liquor unconstrained by the *negative* Commerce Clause in the absence of any congressional pronouncement. This distinction was clear from *Idlewild*, *Midcal*, and *Capital Cities* themselves. *Idlewild* and *Capital Cities* acknowledged explicitly that §2 trumps the negative Commerce Clause. See *Idlewild*, *supra*, at 330 ("'Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . .'"), quoting *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391, 394 (1939); *Capital Cities*, *supra*, at 712 ("'This Court's decisions . . . have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause.' . . . [Section] 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"), quoting *Craig* v. *Boren*, 429 U. S. 190, 206 (1976).

In short, *Bacchus*' rule that the Commerce Clause places restrictions on state power under §2 in the absence of any congressional action came out of the blue. *Bacchus* overruled the *Young's Market* line in this regard and created a new rule. See *Bacchus*, 468 U. S., at 278–287 (STEVENS, J.,

dissenting) (explaining just how new the rule of that case was).

There is nothing in the nature of the *Bacchus* rule that dictates retroactive application. The negative Commerce Clause, which underlies that rule, prohibits States from interfering with interstate commerce. As to its application in *Bacchus*, that purpose is fully served if States are, from the date of that decision, prevented from enacting similar tax schemes. Petitioner James Beam argues that the purposes of the Commerce Clause will not be served fully unless *Bacchus* is applied retroactively. The company contends that retroactive application will further deter States from enacting such schemes. The argument fails. Before our decision in *Bacchus*, the State of Georgia was fully justified in believing that the tax at issue in this case did not violate the Commerce Clause. Indeed, before *Bacchus* it did not violate the Commerce Clause. The imposition of liability in hindsight against a State that, acting reasonably would do the same thing again, will prevent no unconstitutionality. See *American Trucking*, 496 U. S., at 180–181 (plurality opinion).

Precisely because *Bacchus* was so unprecedented, the equities weigh heavily against retroactive application of the rule announced in that case. "Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern . . . . By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking*, *supra*, at 182 (plurality opinion). In this case, Georgia reasonably relied not only on the *Young's Market* line of cases from this Court, but a Georgia Supreme Court decision upholding the predecessor to the tax statute at issue. See *Scott* v. *Georgia*, 187 Ga. 702, 705, 2 S. E. 2d 65, 66 (1939), relying on *Young's Market* and *Indianapolis Brewing*.

Nor is there much to weigh in the balance. Before *Bacchus*, the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate.

The equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law. James Beam claims that if *Bacchus* is applied retroactively, and the Georgia excise tax is declared to have been collected unconstitutionally from 1982 to 1984, the State owes the company a $2.4 million refund. App. 8. There are at least two identical refund actions pending in the Georgia courts. These plaintiffs seek refunds of almost $28 million. See *Heublein, Inc.* v. *Georgia*, Civ. Action No. 87–3542–6 (DeKalb Super. Ct., Apr. 24, 1987); *Joseph E. Seagram & Sons, Inc.* v. *Georgia*, Civ. Action No. 87–7070–8 (DeKalb Super. Ct., Sept. 4, 1987); Brief for Respondents 26, n. 8. The State estimates its total potential liability to all those taxed at $30 million. *Id.*, at 9. To impose on Georgia and the other States that reasonably relied on this Court's established precedent such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services, is the height of unfairness.

We are not concerned here with a State that reaped an unconstitutional windfall from its taxpayers. Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of Georgia in the form of higher taxes and reduced benefits. Nothing in our jurisprudence compels that result; our traditional analysis of retroactivity dictates against it.

A fair application of the *Chevron Oil* analysis requires that *Bacchus* not be applied retroactively. It should not have been applied even to the parties in that case. That mistake was made. The Court today compounds the problem by imposing widespread liability on parties having no reason to expect it. This decision is made in the name of "equality" and "*stare decisis*." By refusing to take into account the settled expectations of those who relied on this Court's established precedents, the Court's decision perverts the meaning of both those terms. I respectfully dissent.

BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL. *v.* GLEN THEATRE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 90–26. Argued January 8, 1991—Decided June 21, 1991

Respondents, two Indiana establishments wishing to provide totally nude dancing as entertainment and individual dancers employed at those establishments, brought suit in the District Court to enjoin enforcement of the state public indecency law—which requires respondent dancers to wear pasties and G-strings—asserting that the law's prohibition against total nudity in public places violates the First Amendment. The court held that the nude dancing involved here was not expressive conduct. The Court of Appeals reversed, ruling that nonobscene nude dancing performed for entertainment is protected expression, and that the statute was an improper infringement of that activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers.

Held: The judgment is reversed.

904 F. 2d 1081, reversed.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR and JUSTICE KENNEDY, concluded that the enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First Amendment's guarantee of freedom of expression. Pp. 565–572.

(a) Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, although only marginally so. See, *e. g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932. Pp. 565–566.

(b) Applying the four-part test of *United States* v. *O'Brien*, 391 U. S. 367, 376–377—which rejected the contention that symbolic speech is entitled to full First Amendment protection—the statute is justified despite its incidental limitations on some expressive activity. The law is clearly within the State's constitutional power. And it furthers a substantial governmental interest in protecting societal order and morality. Public indecency statutes reflect moral disapproval of people appearing in the nude among strangers in public places, and this particular law follows a line of state laws, dating back to 1831, banning public nudity. The States' traditional police power is defined as the authority to provide for the public health, safety, and morals, and such a basis for legislation

has been upheld. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61. This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity. The law does not proscribe nudity in these establishments because the dancers are conveying an erotic message. To the contrary, an erotic performance may be presented without any state interference, so long as the performers wear a scant amount of clothing. Finally, the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest. Since the statutory prohibition is not a means to some greater end, but an end itself, it is without cavil that the statute is narrowly tailored. Pp. 566–572.

JUSTICE SCALIA concluded that the statute—as a general law regulating conduct and not specifically directed at expression, either in practice or on its face—is not subject to normal First Amendment scrutiny and should be upheld on the ground that moral opposition to nudity supplies a rational basis for its prohibition. Cf. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872. There is no intermediate level of scrutiny requiring that an incidental restriction on expression, such as that involved here, be justified by an important or substantial governmental interest. Pp. 572–580.

JUSTICE SOUTER, agreeing that the nude dancing at issue here is subject to a degree of First Amendment protection, and that the test of *United States* v. *O'Brien*, 391 U. S. 367, is the appropriate analysis to determine the actual protection required, concluded that the State's interest in preventing the secondary effects of adult entertainment establishments—prostitution, sexual assaults, and other criminal activity—is sufficient under *O'Brien* to justify the law's enforcement against nude dancing. The prevention of such effects clearly falls within the State's constitutional power. In addition, the asserted interest is plainly substantial, and the State could have concluded that it is furthered by a prohibition on nude dancing, even without localized proof of the harmful effects. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 50, 51. Moreover, the interest is unrelated to the suppression of free expression, since the pernicious effects are merely associated with nude dancing establishments and are not the result of the expression inherent in nude dancing. *Id.*, at 48. Finally, the restriction is no greater than is essential to further the governmental interest, since pasties and a G-string moderate expression to a minor degree when measured against the dancer's remaining capacity and opportunity to express an erotic message. Pp. 581–587.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., *post*, p. 572, and SOUTER, J., *post*, p. 581, filed opinions concurring in the judgment. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 587.

Wayne E. Uhl, Deputy Attorney General of Indiana, argued the cause for petitioners. With him on the briefs was *Linley E. Pearson*, Attorney General.

Bruce J. Ennis, Jr., argued the cause for respondents. *Lee J. Klein* and *Bradley J. Shafer* filed a brief for respondents Glen Theatre, Inc., et al. *Patrick Louis Baude* and *Charles A. Asher* filed a brief for respondents Darlene Miller et al.*

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE KENNEDY join.

Respondents are two establishments in South Bend, Indiana, that wish to provide totally nude dancing as entertainment, and individual dancers who are employed at these

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, and *Steven J. Twist*, Chief Assistant Attorney General, *Clarine Nardi Riddle*, Attorney General of Connecticut, and *John J. Kelly*, Chief State's Attorney, *William L. Webster*, Attorney General of Missouri, *Lacy H. Thornburg*, Attorney General of North Carolina, and *Rosalie Simmonds Ballentine*, Acting Attorney General of the Virgin Islands; for the American Family Association, Inc., et al. by *Alan E. Sears*, *James Mueller*, and *Peggy M. Coleman;* and for the National Governors' Association et al. by *Benna Ruth Solomon* and *Peter Buscemi*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Spencer Neth*, *Thomas D. Buckley, Jr.*, *Steven R. Shapiro*, and *John A. Powell;* for the Georgia on Premise & Lounge Association, Inc., by *James A. Walrath;* for People for the American Way et al. by *Timothy B. Dyk*, *Robert H. Klonoff*, *Patricia A. Dunn*, *Elliot M. Mincberg*, *Stephen F. Rohde*, and *Mary D. Dorman*.

James J. Clancy filed a brief *pro se* as *amicus curiae*.

establishments. They claim that the First Amendment's guarantee of freedom of expression prevents the State of Indiana from enforcing its public indecency law to prevent this form of dancing. We reject their claim.

The facts appear from the pleadings and findings of the District Court and are uncontested here. The Kitty Kat Lounge, Inc. (Kitty Kat), is located in the city of South Bend. It sells alcoholic beverages and presents "go-go dancing." Its proprietor desires to present "totally nude dancing," but an applicable Indiana statute regulating public nudity requires that the dancers wear "pasties" and "G-strings" when they dance. The dancers are not paid an hourly wage, but work on commission. They receive a 100 percent commission on the first $60 in drink sales during their performances. Darlene Miller, one of the respondents in the action, had worked at the Kitty Kat for about two years at the time this action was brought. Miller wishes to dance nude because she believes she would make more money doing so.

Respondent Glen Theatre, Inc., is an Indiana corporation with a place of business in South Bend. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings, and live entertainment at an enclosed "bookstore." The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time. One of Glen Theatre's dancers, Gayle Ann Marie Sutro, has danced, modeled, and acted professionally for more than 15 years, and in addition to her performances at the Glen Theatre, can be seen in a pornographic movie at a nearby theater. App. to Pet. for Cert. 131–133.

Respondents sued in the United States District Court for the Northern District of Indiana to enjoin the enforcement of the Indiana public indecency statute, Ind. Code § 35–45–4–1

(1988), asserting that its prohibition against complete nudity in public places violated the First Amendment. The District Court originally granted respondents' prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed, deciding that previous litigation with respect to the statute in the Supreme Court of Indiana and this Court precluded the possibility of such a challenge,[1] and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied to their dancing. *Glen Theatre, Inc.* v. *Pearson*, 802 F. 2d 287, 288–290 (1986). On remand, the District Court concluded that

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[1] The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack: "There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State* v. *Baysinger*, 272 Ind. 236, 247, 397 N. E. 2d 580, 587 (1979) (emphasis added), appeals dism'd *sub nom. Clark* v. *Indiana*, 446 U. S. 931, and *Dove* v. *Indiana*, 449 U. S. 806 (1980).

Five years after *Baysinger*, however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did "not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity," in a case involving a partially nude dance in the "Miss Erotica of Fort Wayne" contest. *Erhardt* v. *State*, 468 N. E. 2d 224 (Ind. 1984). The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger*, and Erhardt's conduct fell within the statutory prohibition. Justice Hunter dissented, arguing that "a public indecency statute which prohibits nudity in any public place is unconstitutionally overbroad. My reasons for so concluding have already been articulated in *State* v. *Baysinger*, (1979) 272 Ind. 236, 397 N. E. 2d 580 (Hunter and DeBruler, JJ., dissenting)." 468 N. E. 2d, at 225–226. Justice DeBruler expressed similar views in his dissent in *Erhardt*. *Id.*, at 226. Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger*, but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

"the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and rendered judgment in favor of the defendants. *Glen Theatre, Inc.* v. *Civil City of South Bend*, 695 F. Supp. 414, 419 (1988). The case was again appealed to the Seventh Circuit, and a panel of that court reversed the District Court, holding that the nude dancing involved here was expressive conduct protected by the First Amendment. *Miller* v. *Civil City of South Bend*, 887 F. 2d 826 (1989). The Court of Appeals then heard the case en banc, and the court rendered a series of comprehensive and thoughtful opinions. The majority concluded that nonobscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was an improper infringement of that expressive activity because its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers. *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081 (1990). We granted certiorari, 498 U. S. 807 (1990), and now hold that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and G-strings does not violate the First Amendment.

Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 932 (1975), we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California* v. *LaRue*, 409 U. S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad* v. *Mount Ephraim*, 452 U. S. 61, 66 (1981), we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals

that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity.

Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. The Supreme Court of Indiana has construed the Indiana statute to preclude nudity in what are essentially places of public accommodation such as the Glen Theatre and the Kitty Kat Lounge. In such places, respondents point out, minors are excluded and there are no nonconsenting viewers. Respondents contend that while the State may license establishments such as the ones involved here, and limit the geographical area in which they do business, it may not in any way limit the performance of the dances within them without violating the First Amendment. The petitioners contend, on the other hand, that Indiana's restriction on nude dancing is a valid "time, place, or manner" restriction under cases such as *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984).

The "time, place, or manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), although we have on at least one occasion applied it to conduct occurring on private property. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). In *Clark* we observed that this test has been interpreted to embody much the same standards as those set forth in *United States* v. *O'Brien*, 391 U. S. 367 (1968), and we turn, therefore, to the rule enunciated in *O'Brien*.

O'Brien burned his draft card on the steps of the South Boston Courthouse in the presence of a sizable crowd, and

was convicted of violating a statute that prohibited the knowing destruction or mutilation of such a card. He claimed that his conviction was contrary to the First Amendment because his act was "symbolic speech"—expressive conduct. The Court rejected his contention that symbolic speech is entitled to full First Amendment protection, saying:

> "[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376–377 (footnotes omitted).

Applying the four-part *O'Brien* test enunciated above, we find that Indiana's public indecency statute is justified despite its incidental limitations on some expressive activity. The public indecency statute is clearly within the constitutional power of the State and furthers substantial governmental interests. It is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted

this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose. Nonetheless, the statute's purpose of protecting societal order and morality is clear from its text and history. Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters* v. *New York*, 333 U. S. 507, 515 (1948). Public nudity was considered an act *malum in se*. *Le Roy* v. *Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K. B. 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition. At least as early as 1831, Indiana had a statute punishing "open and notorious lewdness, or . . . any grossly scandalous and public indecency." Rev. Laws of Ind., ch. 26, § 60 (1831); Ind. Rev. Stat., ch. 53, § 81 (1834). A gap during which no statute was in effect was filled by the Indiana Supreme Court in *Ardery* v. *State*, 56 Ind. 328 (1877), which held that the court could sustain a conviction for exhibition of "privates" in the presence of others. The court traced the offense to the Bible story of Adam and Eve. *Id.*, at 329–330. In 1881, a statute was enacted that would remain essentially unchanged for nearly a century:

> "Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of public indecency . . . ." 1881 Ind. Acts, ch. 37, § 90.

The language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976. 1976 Ind. Acts, Pub. L. 148, Art. 45, ch. 4, § 1.[2]

This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61 (1973), we said:

> "In deciding *Roth* [v. *United States*, 354 U. S. 476 (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' *[Id.]*, at 485." (Emphasis omitted.)

And in *Bowers* v. *Hardwick*, 478 U. S. 186, 196 (1986), we said:

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."

Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

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[2] Indiana Code § 35–45–4–1 (1988) provides:

"Public indecency; indecent exposure

"Sec. 1. (a) A person who knowingly or intentionally, in a public place:

"(1) engages in sexual intercourse;

"(2) engages in deviate sexual conduct;

"(3) appears in a state of nudity; or

"(4) fondles the genitals of himself or another person;

commits public indecency, a Class A misdemeanor.

"(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

This interest is unrelated to the suppression of free expression. Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U. S., at 376.

And in *Dallas* v. *Stanglin*, 490 U. S. 19 (1989), we further observed:

> "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment." *Id.*, at 25.

Respondents contend that even though prohibiting nudity in public generally may not be related to suppressing expression, prohibiting the performance of nude dancing is related to expression because the State seeks to prevent its erotic message. Therefore, they reason that the application of the Indiana statute to the nude dancing in this case violates the First Amendment, because it fails the third part of the *O'Brien* test, viz: the governmental interest must be unrelated to the suppression of free expression.

But we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers.

Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and G-strings does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

This conclusion is buttressed by a reference to the facts of *O'Brien*. An Act of Congress provided that anyone who knowingly destroyed a Selective Service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his antiwar beliefs. This Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the Selective Service System. O'Brien's deliberate destruction of his certificate frustrated this purpose and "[f]or this noncommunicative impact of his conduct, and for nothing else, he was convicted." 391 U. S., at 382. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, *id.*, at 376, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

The fourth part of the *O'Brien* test requires that the incidental restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As indicated in the discussion above, the

governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

The judgment of the Court of Appeals accordingly is

Reversed.

JUSTICE SCALIA, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. In my view, however, the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.

I

Indiana's public indecency statute provides:

> "(a) A person who knowingly or intentionally, in a public place:
>
> "(1) engages in sexual intercourse;
>
> "(2) engages in deviate sexual conduct;
>
> "(3) appears in a state of nudity; or
>
> "(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
>
> "(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state." Ind. Code § 35–45–4–1 (1988).

On its face, this law is not directed at expression in particular. As Judge Easterbrook put it in his dissent below: "Indi-

ana does not regulate dancing. It regulates public nudity. . . . Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081, 1120 (CA7 1990). The intent to convey a "message of eroticism" (or any other message) is not a necessary element of the statutory offense of public indecency; nor does one commit that statutory offense by conveying the most explicit "message of eroticism," so long as he does not commit any of the four specified acts in the process.[1]

Indiana's statute is in the line of a long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of "the freedom of speech." Public indecency—including public nudity—has long been an offense at common law. See 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity §17, pp. 449, 472–474 (1970); Annot., Criminal offense predicated on indecent exposure, 93 A. L. R. 996, 997–998 (1934); *Winters* v. *New York*, 333 U. S. 507, 515 (1948). Indiana's first public nudity statute, Rev. Laws of Ind., ch. 26, §60 (1831), predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all succeeding statutes, down to

[1] Respondents assert that the statute cannot be characterized as a general regulation of conduct, unrelated to suppression of expression, because one defense put forward in oral argument below by the attorney general referred to the "message of eroticism" conveyed by respondents. But that argument seemed to go to whether the statute could constitutionally be applied to the present performances, rather than to what was the purpose of the legislation. Moreover, the State's argument below was in the alternative: (1) that the statute does not implicate the First Amendment because it is a neutral rule not directed at expression, and (2) that the statute in any event survives First Amendment scrutiny because of the State's interest in suppressing nude barroom dancing. The second argument can be claimed to contradict the first (though I think it does not); but it certainly does not waive or abandon it. In any case, the clear purpose shown by both the text and historical use of the statute cannot be refuted by a litigating statement in a single case.

the present one, have been the same. Were it the case that Indiana *in practice* targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools, see *Miller*, 904 F. 2d, at 1120, 1121, it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. See *Bond* v. *State*, 515 N. E. 2d 856, 857 (Ind. 1987); *In re Levinson*, 444 N. E. 2d 1175, 1176 (Ind. 1983); *Preston* v. *State*, 259 Ind. 353, 354–355, 287 N. E. 2d 347, 348 (1972); *Thomas* v. *State*, 238 Ind. 658, 659–660, 154 N. E. 2d 503, 504–505 (1958); *Blanton* v. *State*, 533 N. E. 2d 190, 191 (Ind. App. 1989); *Sweeney* v. *State*, 486 N. E. 2d 651, 652 (Ind. App. 1985); *Thompson* v. *State*, 482 N. E. 2d 1372, 1373–1374 (Ind. App. 1985); *Adims* v. *State*, 461 N. E. 2d 740, 741–742 (Ind. App. 1984); *State* v. *Elliott*, 435 N. E. 2d 302, 304 (Ind. App. 1982); *Lasko* v. *State*, 409 N. E. 2d 1124, 1126 (Ind. App. 1980).[2]

The dissent confidently asserts, *post*, at 590–591, that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no

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[2] Respondents also contend that the statute, as interpreted, is not content neutral in the expressive conduct to which it applies, since it allegedly does not apply to nudity in theatrical productions. See *State* v. *Baysinger*, 272 Ind. 236, 247, 397 N. E. 2d 580, 587 (1979). I am not sure that theater versus nontheater represents a distinction based on content rather than format, but assuming that it does, the argument nonetheless fails for the reason the plurality describes, *ante*, at 564, n. 1.

basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i. e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality." See *Bowers* v. *Hardwick*, 478 U. S. 186, 196 (1986) (upholding prohibition of private homosexual sodomy enacted solely on "the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable"). See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 68, n. 15 (1973); *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 238, and n. 6, 741 F. 2d 1388, 1397, and n. 6 (1984) (opinion of Bork, J.). The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be repression of communication.[3]

[3] The dissent, *post*, at 590, 595–596, also misunderstands what is meant by the term "general law." I do not mean that the law restricts the tar-

II

Since the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not in my view implicate the First Amendment.

The First Amendment explicitly protects "the freedom of speech [and] of the press"—oral and written speech—not "expressive conduct." When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia* v. *New York*, 334 U. S. 558, 561 (1948), to regulate election campaigns, see *Buckley* v. *Valeo*, 424 U. S. 1, 16 (1976), or to prevent littering, see *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939)), we insist that it meet the high, First Amendment standard of justification. But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition. See, *e. g.*, *Florida Free Beaches, Inc.* v. *Miami*, 734 F. 2d 608, 609 (CA11 1984) (nude sunbathers challenging public indecency law claimed their "message" was that nudity is not indecent). It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested, see, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968)—that it be justified by an "important or sub-

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geted conduct in all places at all times. A law is "general" for the present purposes if it regulates conduct without regard to whether that conduct is expressive. Concededly, Indiana bans nudity in public places, but not within the privacy of the home. (That is not surprising, since the common-law offense, and the traditional moral prohibition, runs against *public* nudity, not against all nudity. *E. g.*, 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17, pp. 472–474 (1970)). But that confirms, rather than refutes, the general nature of the law: One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one *may* go nude in private, again whether or not that nudity is expressive.

stantial" government interest. Nor do our holdings require such justification: We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government could not demonstrate a sufficiently important state interest.

This is not to say that the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional. See, *e. g.*, *United States* v. *Eichman*, 496 U. S. 310 (1990) (burning flag); *Texas* v. *Johnson*, 491 U. S. 397 (1989) (same); *Spence* v. *Washington*, 418 U. S. 405 (1974) (defacing flag); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969) (wearing black arm bands); *Brown* v. *Louisiana*, 383 U. S. 131 (1966) (participating in silent sit-in); *Stromberg* v. *California*, 283 U. S. 359 (1931) (flying a red flag).[4] In each of the foregoing cases, we explicitly found that suppressing communication was the object of the regulation of conduct. Where that has not been the case, however—where suppression of communicative use of the conduct was merely the incidental effect of forbidding the conduct for other reasons—we have allowed the regulation to stand. *O'Brien*, *supra*, at 377 (law banning destruction of draft card upheld in application against card burning to pro-

[4] It is easy to conclude that conduct has been forbidden because of its communicative attributes when the conduct in question is what the Court has called "inherently expressive," and what I would prefer to call "conventionally expressive"—such as flying a red flag. I mean by that phrase (as I assume the Court means by "inherently expressive") conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits that description, see *Dallas* v. *Stanglin*, 490 U. S. 19, 24 (1989) (social dance group "do[es] not involve the sort of expressive association that the First Amendment has been held to protect"). But even if it does, this law is directed against nudity, not dancing. Nudity is *not* normally engaged in for the purpose of communicating an idea or an emotion.

test war); *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990) (Sherman Act upheld in application against restraint of trade to protest low pay); cf. *United States* v. *Albertini*, 472 U. S. 675, 687–688 (1985) (rule barring respondent from military base upheld in application against entrance on base to protest war); *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984) (rule barring sleeping in parks upheld in application against persons engaging in such conduct to dramatize plight of homeless). As we clearly expressed the point in *Johnson:*

> "The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. What might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription." 491 U. S., at 406 (internal quotation marks and citations omitted; emphasis in original).

All our holdings (though admittedly not some of our discussion) support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription." *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (en banc) (Scalia, J., dissenting), (footnote omitted; emphasis omitted), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984). Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation

(which means in effect all regulation) survive an enhanced level of scrutiny.

We have explicitly adopted such a regime in another First Amendment context: that of free exercise. In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), we held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion. "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.*, at 885, quoting *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 451 (1988); see also *Minersville School District* v. *Gobitis*, 310 U. S. 586, 594–595 (1940) (Frankfurter, J.) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs"). There is even greater reason to apply this approach to the regulation of expressive conduct. Relatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression. In the one case, as in the other, if the law is not directed against the protected value (religion or expression) the law must be obeyed.

III

While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be "'important or substantial,'" *ante*, at 567, quoting *O'Brien*, *supra*, at 377. As I have indi-

cated, I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests—and especially of government interests in various aspects of morality.

Neither of the cases that the plurality cites to support the "importance" of the State's interest here, see *ante*, at 569, is in point. *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 61, and *Bowers* v. *Hardwick*, 478 U. S., at 196, did uphold laws prohibiting private conduct based on concerns of decency and morality; but neither opinion held that those concerns were particularly "important" or "substantial," or amounted to anything more than a *rational basis* for regulation. *Slaton* involved an exhibition which, since it was obscene and at least to some extent public, was unprotected by the First Amendment, see *Roth* v. *United States*, 354 U. S. 476 (1957); the State's prohibition could therefore be invalidated only if it had no rational basis. We found that the State's "right . . . to maintain a decent society" provided a "legitimate" basis for regulation—even as to obscene material viewed by consenting adults. 413 U. S., at 59–60. In *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis. 478 U. S., at 196. I would uphold the Indiana statute on precisely the same ground: Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed.

* * *

Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who choose to employ con-

duct as a means of expression must make sure that the conduct they select is not generally forbidden. For these reasons, I agree that the judgment should be reversed.

JUSTICE SOUTER, concurring in the judgment.

Not all dancing is entitled to First Amendment protection as expressive activity. This Court has previously categorized ballroom dancing as beyond the Amendment's protection, *Dallas* v. *Stanglin*, 490 U. S. 19, 24–25 (1989), and dancing as aerobic exercise would likewise be outside the First Amendment's concern. But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience. Such is the expressive content of the dances described in the record.

Although such performance dancing is inherently expressive, nudity *per se* is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless. A search for some expression beyond the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing. But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function. Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection.

I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States* v. *O'Brien*, 391 U. S. 367 (1968), for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation. I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.

It is, of course, true that this justification has not been articulated by Indiana's Legislature or by its courts. As the plurality observes, "Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose," *ante*, at 568. While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality . . . from [the statute's] text and history," *ibid.*, I think that we need not so limit ourselves in identifying the justification for the legislation at issue here, and may legitimately consider petitioners' assertion that the statute is applied to nude dancing because such dancing "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." Brief for Petitioners 37.

This asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana Legislature in enacting the statute. Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. Cf. *McGowan* v. *Maryland*, 366 U. S. 420

(1961). At least as to the regulation of expressive conduct,[1] "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, *supra*, at 384. In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

At the outset, it is clear that the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion. See 391 U. S., at 377. The second *O'Brien* prong asks whether the regulation "furthers an important or substantial governmental interest." *Ibid.* The asserted state interest is plainly a substantial one; the only question is whether prohibiting nude dancing of the sort at issue here "furthers" that interest. I believe that our cases have addressed this question sufficiently to establish that it does.

In *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including the crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing "'matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" . . . for observation by patrons therein.'" *Id.*, at 44. Of particular importance to the present enquiry, we held that the city of Renton was not compelled to justify its restrictions by studies specifically relating to the problems

[1] Cf., *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578 (1987) (striking down state statute on Establishment Clause grounds due to impermissible legislative intent).

that would be caused by adult theaters in that city. Rather, "Renton was entitled to rely on the experiences of Seattle and other cities," *id.*, at 51, which demonstrated the harmful secondary effects correlated with the presence "of even one [adult] theater in a given neighborhood." *Id.*, at 50; cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71, n. 34 (1976) (legislative finding that "a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime"); *California* v. *LaRue*, 409 U. S. 109, 111 (1972) (administrative findings of criminal activity associated with adult entertainment).

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying "specified anatomical areas" at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, *e. g.*, *United States* v. *Marren*, 890 F. 2d 924, 926 (CA7 1989) (prostitution associated with nude dancing establishment); *United States* v. *Doerr*, 886 F. 2d 944, 949 (CA7 1989) (same). In light of *Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes. Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," *American Mini Theatres*, *supra*, at 70, I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every

case. The statute as applied to nudity of the sort at issue here therefore satisfies the second prong of *O'Brien*.[2]

The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U. S., at 377, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. The dissent contends, however, that Indiana seeks to regulate nude dancing as its means of combating such secondary effects "because . . . creating or emphasizing [the] thoughts and ideas [expressed by nude dancing] in the minds of the spectators may lead to increased prostitution," *post*, at 592, and that regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression. *Ibid.*

The major premise of the dissent's reasoning may be correct, but its minor premise describing the causal theory of Indiana's regulatory justification is not. To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation

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[2] Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here would be open to question if the State were to seek to enforce the statute by barring expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. *Renton* is again persuasive in support of this conclusion. In *Renton*, we held that an ordinance that regulated adult theaters because the presence of such theaters was correlated with secondary effects that the local government had an interest in regulating was content neutral (a determination similar to the "unrelated to the suppression of free expression" determination here, see *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298, and n. 8 (1984)) because it was "*justified* without reference to the content of the regulated speech." 475 U. S., at 48 (emphasis in original). We reached this conclusion without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated. Similarly here, the "secondary effects" justification means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression,[3] to satisfy the third prong of the *O'Brien* test.

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[3] I reach this conclusion again mindful, as was the Court in *Renton*, that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression. See *Renton*,

The fourth *O'Brien* condition, that the restriction be no greater than essential to further the governmental interest, requires little discussion. Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message. Nor, so far as we are told, is the dancer or her employer limited by anything short of obscenity laws from expressing an erotic message by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.

Accordingly, I find *O'Brien* satisfied and concur in the judgment.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The first question presented to us in this case is whether nonobscene nude dancing performed as entertainment is expressive conduct protected by the First Amendment. The Court of Appeals held that it is, observing that our prior decisions permit no other conclusion. Not surprisingly, then, the plurality now concedes that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . . ." *Ante*, at 566. This is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and "inherently embodies the expression and communication of ideas and emotions." *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081, 1087 (1990) (en banc).[1]

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supra, at 49, and n. 2, citing *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 70 (1976).

[1] JUSTICE SCALIA suggests that performance dancing is not inherently expressive activity, see *ante*, at 577, n. 4, but the Court of Appeals has the better view: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate

Having arrived at the conclusion that nude dancing performed as entertainment enjoys First Amendment protection, the plurality states that it must "determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity." *Ante*, at 566. For guidance, the plurality turns to *United States* v. *O'Brien*, 391 U. S. 367 (1968), which held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression. The plurality finds that the Indiana statute satisfies the *O'Brien* test in all respects.

The plurality acknowledges that it is impossible to discern the exact state interests which the Indiana Legislature had in mind when it enacted the Indiana statute, but the plurality nonetheless concludes that it is clear from the statute's text and history that the law's purpose is to protect "societal order and morality." *Ante*, at 568. The plurality goes on to

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a story, or simply to take delight in the movement itself.' 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all '[t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance.' Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is 'to represent men's character as well as what they do and suffer.' The raw communicative power of dance was noted by the French poet Stéphane Mallarmé who declared that the dancer 'writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.'" 904 F. 2d, at 1085–1086. JUSTICE SCALIA cites *Dallas* v. *Stanglin*, 490 U. S. 19 (1989), but that decision dealt with social dancing, not performance dancing; and the submission in that case, which we rejected, was not that social dancing was an expressive activity but that plaintiff's *associational* rights were violated by restricting admission to dance halls on the basis of age. The Justice also asserts that even if dancing is inherently expressive, nudity is not. The statement may be true, but it tells us nothing about dancing in the nude.

conclude that Indiana's statute "was enacted as *a general prohibition*," *ante*, at 568 (emphasis added), on people appearing in the nude among strangers in public places. The plurality then points to cases in which we upheld legislation based on the State's police power, and ultimately concludes that the Indiana statute "furthers a substantial government interest in protecting order and morality." *Ante*, at 569. The plurality also holds that the basis for banning nude dancing is unrelated to free expression and that it is narrowly drawn to serve the State's interest.

The plurality's analysis is erroneous in several respects. Both the plurality and JUSTICE SCALIA in his opinion concurring in the judgment overlook a fundamental and critical aspect of our cases upholding the States' exercise of their police powers. None of the cases they rely upon, including *O'Brien* and *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), involved anything less than truly *general* proscriptions on individual conduct. In *O'Brien*, for example, individuals were prohibited from destroying their draft cards at any time and in any place, even in completely private places such as the home. Likewise, in *Bowers*, the State prohibited sodomy, regardless of where the conduct might occur, including the home as was true in that case. The same is true of cases like *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which, though not applicable here because it did not involve any claim that the peyote users were engaged in expressive activity, recognized that the State's interest in preventing the use of illegal drugs extends even into the home. By contrast, in this case Indiana does not suggest that its statute applies to, or could be applied to, nudity wherever it occurs, including the home. We do not understand the plurality or JUSTICE SCALIA to be suggesting that Indiana could constitutionally enact such an intrusive prohibition, nor do we think such a suggestion would be tenable in light of our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969), in which we held that States could not punish the

mere possession of obscenity in the privacy of one's own home.

We are told by the attorney general of Indiana that, in *State* v. *Baysinger*, 272 Ind. 236, 397 N. E. 2d 580 (1979), the Indiana Supreme Court held that the statute at issue here cannot and does not prohibit nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved. Brief for Petitioners 25, 30–31; Reply Brief for Petitioners 9–11. Petitioners also state that the evils sought to be avoided by applying the statute in this case would not obtain in the case of theatrical productions, such as "Salome" or "Hair." *Id.*, at 11–12. Neither is there any evidence that the State has attempted to apply the statute to nudity in performances such as plays, ballets, or operas. "No arrests have ever been made for nudity as part of a play or ballet." App. 19 (affidavit of Sgt. Timothy Corbett).

Thus, the Indiana statute is not a *general* prohibition of the type we have upheld in prior cases. As a result, the plurality and JUSTICE SCALIA's simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity. Instead, in applying the *O'Brien* test, we are obligated to carefully examine the reasons the State has chosen to regulate this expressive conduct in a less than general statute. In other words, when the State enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made. Closer inquiry as to the purpose of the statute is surely appropriate.

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed. Indeed, a law may have multiple purposes. The purpose of

forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. This is why *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288 (1984), is of no help to the State: "In *Clark* . . . the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless." 904 F. 2d, at 1103 (Posner, J., concurring). That cannot be said in this case: The perceived damage to the public interest caused by appearing nude on the streets or in the parks, as I have said, is not what the State seeks to avoid in preventing nude dancing in theaters and taverns. There the perceived harm is the communicative aspect of the erotic dance. As the State now tells us, and as JUSTICE SOUTER agrees, the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure." Reply Brief for Petitioners 11. The attainment of these goals, however, depends on preventing an expressive activity.

The plurality nevertheless holds that the third requirement of the *O'Brien* test, that the governmental interest be unrelated to the suppression of free expression, is satisfied because in applying the statute to nude dancing, the State is not "proscribing nudity because of the erotic message conveyed by the dancers." *Ante*, at 570. The plurality suggests that this is so because the State does not ban dancing that sends an erotic message; it is only nude erotic dancing that is forbidden. The perceived evil is not erotic dancing but pub-

lic nudity, which may be prohibited despite any incidental impact on expressive activity. This analysis is transparently erroneous.

In arriving at its conclusion, the plurality concedes that nude dancing conveys an erotic message and concedes that the message would be muted if the dancers wore pasties and G-strings. Indeed, the emotional or erotic impact of the dance is intensified by the nudity of the performers. As Judge Posner argued in his thoughtful concurring opinion in the Court of Appeals, the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes. 904 F. 2d, at 1090–1098. The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental "conduct." We have previously pointed out that "'[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad* v. *Mt. Ephraim*, 452 U. S. 61, 66 (1981).

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances can-

not be neatly pigeonholed as mere "conduct" independent of any expressive component of the dance.[2]

That fact dictates the level of First Amendment protection to be accorded the performances at issue here. In *Texas* v. *Johnson*, 491 U. S. 397, 411–412 (1989), the Court observed: "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. . . .We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.' *Boos* v. *Barry*, 485 U. S. [312], 321 [(1988)]." Content based restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States* v. *Grace*, 461 U. S. 171, 177 (1983); *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). Nothing could be clearer from our cases.

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding this case. In the words of Justice Harlan: "[I]t is largely because governmental officials cannot make principled deci-

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[2] JUSTICE SOUTER agrees with the plurality that the third requirement of the *O'Brien* test is satisfied, but only because he is not certain that there is a causal connection between the message conveyed by nude dancing and the evils which the State is seeking to prevent. See *ante*, at 585. JUSTICE SOUTER's analysis is at least as flawed as that of the plurality. If JUSTICE SOUTER is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive. Furthermore, if the real problem is the "concentration of crowds of men predisposed" to the designated evils, *ante*, at 586, then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986).

sions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California*, 403 U. S. 15, 25 (1971). "[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." *Salem Inn, Inc.* v. *Frank*, 501 F. 2d 18, 21, n. 3 (CA2 1974), aff'd in part *sub nom. Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975).

The plurality and JUSTICE SOUTER do not go beyond saying that the state interests asserted here are important and substantial. But even if there were compelling interests, the Indiana statute is not narrowly drawn. If the State is genuinely concerned with prostitution and associated evils, as JUSTICE SOUTER seems to think, or the type of conduct that was occurring in *California* v. *LaRue*, 409 U. S. 109 (1972), it can adopt restrictions that do not interfere with the expressiveness of nonobscene nude dancing performances. For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986). Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny. See *Frisby* v. *Schultz*, 487 U. S. 474, 485 (1988). Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem, the State could invoke its Twenty-first Amendment powers and impose appropriate regulation. *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) *(per curiam); California* v. *LaRue, supra.*

As I see it, our cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.

JUSTICE SCALIA's views are similar to those of the plurality and suffer from the same defects. The Justice asserts that a general law barring specified conduct does not implicate the First Amendment unless the purpose of the law is to suppress the expressive quality of the forbidden conduct, and that, absent such purpose, First Amendment protections are not triggered simply because the incidental effect of the law is to proscribe conduct that is unquestionably expressive. Cf. *Community for Creative Non-Violence* v. *Watt*, 227 U. S. App. D. C. 19, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting). The application of the Justice's proposition to this case is simple to state: The statute at issue is a general law banning nude appearances in public places, including barrooms and theaters. There is no showing that the purpose of this general law was to regulate expressive conduct; hence, the First Amendment is irrelevant and nude dancing in theaters and barrooms may be forbidden, irrespective of the expressiveness of the dancing.

As I have pointed out, however, the premise for the Justice's position—that the statute is a *general* law of the type our cases contemplate—is nonexistent in this case. Reference to JUSTICE SCALIA's own hypothetical makes this clear. We agree with JUSTICE SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if, as JUSTICE SCALIA seems to suggest, nudity is inherently evil, but clearly the statute does

not reach such activity. As we pointed out earlier, the State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn. See *supra*, at 590.

As explained previously, the purpose of applying the law to the nude dancing performances in respondents' establishments is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing. That being the case, JUSTICE SCALIA's observation is fully applicable here: "Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Ante*, at 577.

The *O'Brien* decision does not help JUSTICE SCALIA. Indeed, his position, like the plurality's, would eviscerate the *O'Brien* test. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), is likewise not on point. The Indiana law, as applied to nude dancing, targets the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates. In *Smith*, the use of drugs was not criminal because the use was part of or occurred within the course of an otherwise protected religious ceremony, but because a general law made it so and was supported by the same interests in the religious context as in others.

Accordingly, I would affirm the judgment of the Court of Appeals, and dissent from this Court's judgment.

Syllabus

WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 89–1905. Argued April 24, 1991—Decided June 21, 1991

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or Act), 7 U. S. C. § 136 *et seq.*, was primarily a pesticide licensing and labeling law until 1972, when it was transformed by Congress into a comprehensive regulatory statute. Among other things, the 1972 amendments significantly strengthened the pre-existing registration and labeling standards, specified that FIFRA regulates pesticide use as well as sales and labeling, and granted increased enforcement authority to the Environmental Protection Agency (EPA). Regarding state and local authorities, FIFRA, as amended, includes provisions requiring pesticide manufacturers to produce records for inspection "upon request of any officer or employee . . . of any State or political subdivision," § 136f(b); directing the EPA to cooperate with "any appropriate agency of any State or any political subdivision thereof . . . in securing uniformity of regulations," § 136t(b); and specifying that "[a] State" may regulate pesticide sale or use so long as such regulation does not permit a sale or use prohibited by the Act, § 136v(a). Pursuant to its statutory police power, petitioner town adopted an ordinance that, *inter alia*, requires a permit for certain applications of pesticides to private lands. After the town issued a decision unfavorable to respondent Mortier on his application for a permit to spray a portion of his land, he brought a declaratory judgment action in county court, claiming, among other things, that the ordinance was preempted by FIFRA. The court granted summary judgment for Mortier, and the Wisconsin Supreme Court affirmed, finding pre-emption on the ground that the Act's text and legislative history demonstrate a clearly manifest congressional intent to prohibit any regulation of pesticides by local governmental units.

Held: FIFRA does not pre-empt local governmental regulation of pesticide use. Pp. 604–616.

(a) When considering pre-emption, this Court starts with the assumption that the States' historic powers are not superseded by federal law unless that is the clear and manifest purpose of Congress. That purpose may be expressed in the terms of the statute itself. Absent explicit preemptive language, congressional intent to supersede state law may nonetheless be implicit if, for example, the federal Act touches a field in which the federal interest is so dominant that the federal system will be

assumed to preclude enforcement of state laws on the same subject. Even where Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict, as when compliance with both is a physical impossibility, or when the state law stands as an obstacle to the accomplishment of Congress' purposes and objectives. Pp. 604–605.

(b) FIFRA nowhere expressly supersedes local regulation. Neither the Act's language nor the legislative history relied on by the court below, whether read together or separately, suffices to establish pre-emption. The fact that § 136v(a) expressly refers only to "[a] State" as having the authority to regulate pesticide use, and the Act's failure to include political subdivisions in its § 136(aa) definition of "State," are wholly inadequate to demonstrate the requisite clear and manifest congressional intent. Mere silence is insufficient in this context. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230. And the exclusion of local governments cannot be inferred from the express authorization to "State[s]" because that term is not self-limiting; political subdivisions are merely subordinate components of the very entity the statute empowers. Cf., *e. g.*, *Sailors* v. *Board of Ed. of Kent Cty.*, 387 U. S. 105, 108. Indeed, the more plausible reading of the express authorization leaves the allocation of regulatory authority to the absolute discretion of the States themselves, including the options of specific redelegation or leaving local regulation of pesticides in the hands of local authorities under existing state laws. Nor is there any merit to Mortier's contention that the express references in §§ 136t(b) and 136f(b) to "political subdivision[s]" show that Congress made a clear distinction between nonregulatory authority, which may be exercised by such subdivisions, and the regulatory authority reserved to the "State[s]" in § 136v(a). Furthermore, the legislative history is at best ambiguous, reflecting a disagreement between the responsible congressional committees as to whether the provision that would become § 136v pre-empted local regulation. Pp. 606–610.

(c) FIFRA also fails to provide any clear and manifest indication that Congress sought to supplant local authority over pesticide regulation impliedly. The argument that the 1972 amendments transformed the Act into a comprehensive statute that occupied the entire pesticide regulation field, and that certain provisions, including § 136v(a), reopened certain portions of the field to the States but not to political subdivisions, is unpersuasive. Section 136v itself undercuts any inference of field pre-emption, since § 136v(b) prohibits States from enacting or imposing labeling or packaging requirements that conflict with those required under FIFRA. This language would be pure surplusage if Congress had already occupied the entire field. Nor does FIFRA otherwise imply pre-emption. While the 1972 amendments turned the Act into a

comprehensive regulatory statute, substantial portions of the field are still left vacant, including the area at issue in this case. FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides or to occupy the field of local use permitting. Thus, the specific grant of authority in § 136v(a) must be read not as an exclusion of municipalities but as an act ensuring that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur. Pp. 611–614.

(d) There is no actual conflict either between FIFRA or the ordinance at issue or between the Act and local regulation generally. Compliance with both the ordinance and FIFRA is not a physical impossibility. Moreover, Mortier's assertions that the ordinance stands as an obstacle to the Act's goals of promoting pesticide regulation that is coordinated solely at the federal and state levels, that rests upon some degree of technical expertise, and that does not unduly burden interstate commerce are based on little more than snippets of legislative history and policy speculations and are unpersuasive. As is evidenced by § 136t(b), FIFRA implies a regulatory partnership between federal, state, *and* local governments. There is no indication that any coordination which the statute seeks to promote extends beyond the matters with which it expressly deals, or does so strongly enough to compel the conclusion that an independently enacted ordinance that falls outside the statute's reach frustrates its purpose. Nor is there any indication in FIFRA that Congress felt that local ordinances necessarily rest on insufficient expertise and burden commerce. Pp. 614–616.

154 Wis. 2d 18, 452 N. W. 2d 555, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 616.

Thomas J. Dawson, Assistant Attorney General of Wisconsin, argued the cause for petitioners. With him on the briefs was *Linda K. Monroe*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Stewart*, *Clifford M. Sloan*, and *David C. Shilton*.

Paul G. Kent argued the cause for respondents. With him on the brief was *Richard J. Lewandowski.**

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to consider whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or Act), 61 Stat. 163, as amended, 7 U. S. C. § 136 *et seq.*, pre-empts the regulation of pesticides by local governments. We hold that it does not.

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*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *Warren Price III*, Attorney General of Hawaii, and *Girard D. Lau* and *Steven S. Michaels*, Deputy Attorneys General, *James H. Evans*, Attorney General of Alabama, *Roland W. Burris*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *Michael E. Carpenter*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *William L. Webster*, Attorney General of Missouri, *Frankie Sue Del Papa*, Attorney General of Nevada, *Ernest Preate, Jr.*, Attorney General of Pennsylvania, *Paul Van Dam*, Attorney General of Utah, and *Jeffrey L. Amestoy*, Attorney General of Vermont; for the Conservation Law Foundation of New England, Inc., et al. by *E. Susan Garsh*, *Robert E. McDonnell*, and *Maris L. Abbene;* for the National Institute of Municipal Law Officers et al. by *Robert J. Alfton*, *William I. Thornton, Jr.*, and *Analeslie Muncy;* for the Village of Milford, Michigan, et al. by *Patti A. Goldman*, *Alan B. Morrison*, and *Brian Wolfman*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *R. H. Connett*, Assistant Attorney General, and *Charles W. Getz III*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Linley E. Pearson* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Robert J. Del Tufo* of New Jersey, and *Kenneth O. Eikenberry* of Washington; for the American Association of Nurserymen et al. by *Frederick A. Provorny* and *Robert A. Kirshner;* for the American Farm Bureau Federation by *John J. Rademacher* and *Richard L. Krause;* for the Green Industry Council by *Stephen S. Ostrach;* for the Professional Lawn Care Association of America by *Joseph D. Lonardo;* for the National Pest Control Association et al. by *Lawrence S. Ebner;* and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *John C. Scully*.

I

A

FIFRA was enacted in 1947 to replace the Federal Government's first effort at pesticide regulation, the Insecticide Act of 1910, 36 Stat. 331. 61 Stat. 163. Like its predecessor, FIFRA as originally adopted "was primarily a licensing and labeling statute." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 991 (1984). In 1972, growing environmental and safety concerns led Congress to undertake a comprehensive revision of FIFRA through the Federal Environmental Pesticide Control Act. 86 Stat. 973. The 1972 amendments significantly strengthened FIFRA's registration and labeling standards. 7 U. S. C. § 136a. To help make certain that pesticides would be applied in accordance with these standards, the revisions further insured that FIFRA "regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; [and] provided for review, cancellation, and suspension of registration." *Ruckelshaus*, *supra*, at 991–992. An additional change was the grant of increased enforcement authority to the Environmental Protection Agency (EPA), which had been charged with federal oversight of pesticides since 1970. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), 5 U. S. C. App., p. 1343. In this fashion, the 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." 467 U. S., at 991.

As amended, FIFRA specifies several roles for state and local authorities. The statute, for example, authorizes the EPA Administrator to enter into cooperative agreements with the States to enforce FIFRA provisions. 7 U. S. C. §§ 136u, 136w–1. As part of the enforcement scheme, FIFRA requires manufacturers to produce records for inspection "upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated by the Administrator." § 136f(b).

FIFRA further directs the EPA Administrator to cooperate with "any appropriate agency of any State or any political subdivision thereof." § 136t(b). Of particular relevance to this case, § 24(a) specifies that States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act. § 136v(a).

B

Petitioner, the town of Casey, is a small rural community located in Washburn County, Wisconsin, several miles northwest of Spooner, on the road to Superior.[1] In 1985, the town adopted Ordinance 85–1, which regulates the use of pesticides. The ordinance expressly borrows statutory definitions from both Wisconsin laws and FIFRA, and was enacted under Wis. Stat. §§ 61.34(1), (5) (1989–1990), which accord village boards general police, health, and taxing powers.[2]

The ordinance requires a permit for the application of any pesticide to public lands, to private lands subject to public

[1] The town has a population of from 400 to 500 persons, large enough to enact the ordinance at issue in this case. See Washburn County Directory 1982–83, cited in Brief for Respondents 4, n. 4; Tr. of Oral Arg. 12.

[2] Section 61.34(1) provides:

"Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language."

Section 61.34(5) provides:

"For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of article XI, section 3, of the [Wisconsin] constitution it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof."

use, or for the aerial application of any pesticide to private lands. § 1.2, 2 App. to Pet. for Cert. 6. A permit applicant must file a form including information about the proposed pesticide use not less than 60 days before the desired use. § 1.3(2), *id.*, at 7. The town board may "deny the permit, grant the permit, or grant the permit with . . . any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey." § 1.3(3), *id.*, at 11–12. After an initial decision, the applicant or any town resident may obtain a hearing to provide additional information regarding the proposed application. §§ 1.3(4), (5), *id.*, at 12–14. When a permit is granted, or granted with conditions, the ordinance further requires the permittee to post placards giving notice of the pesticide use and of any label information prescribing a safe reentry time. § 1.3(7), *id.*, at 14–16. Persons found guilty of violating the ordinance are subject to fines of up to $5,000 for each violation. § 1.3(7)(c), *id.*, at 16.

Respondent Ralph Mortier applied for a permit for aerial spraying of a portion of his land. The town granted him a permit, but precluded any aerial spraying and restricted the lands on which ground spraying would be allowed. Mortier, in conjunction with respondent Wisconsin Forestry/Rights-of-Way/Turf Coalition,[3] brought a declaratory judgment action in the Circuit Court for Washburn County against the town of Casey and named board members, claiming that the town of Casey's ordinance is pre-empted by state and federal law. The Wisconsin Public Intervenor, an assistant attorney general charged under state law with the protection of environmental public rights, Wis. Stat. §§ 165.07, 165.075 (1989–1990), was admitted without objection as a party defendant. On cross-motions for summary judgment, the Circuit Court ruled in favor of Mortier, holding that the town's

[3] The coalition is an unincorporated, nonprofit association of individual businesses and other associations whose members use pesticides.

ordinance was pre-empted both by FIFRA and by state statute, §§ 94.67–94.71; 2 App. to Pet. for Cert. 14.

The Supreme Court of Wisconsin affirmed in a 4-to-3 decision. *Mortier* v. *Casey*, 154 Wis. 2d 18, 452 N. W. 2d 555 (1990). Declining to address the issue of state-law pre-emption, the court concluded that FIFRA pre-empted the town of Casey's ordinance because the statute's text and legislative history demonstrated a clearly manifest congressional intent to prohibit "any regulation of pesticides by local units of government." *Id.*, at 20, n. 2, and 30, 452 N. W. 2d, at 555, n. 2, and 560. The court's decision accorded with the judgments of two Federal Courts of Appeals. *Professional Lawn Care Association* v. *Milford*, 909 F. 2d 929 (CA6 1990); *Maryland Pest Control Association* v. *Montgomery County*, 822 F. 2d 55 (CA4 1987), summarily aff'g 646 F. Supp. 109 (Md. 1986). Two separate dissents concluded that neither FIFRA's language nor its legislative history expressed an intent to pre-empt local regulation. *Casey*, *supra*, at 33, 452 N. W. 2d, at 561 (Abrahamson, J., dissenting); 154 Wis. 2d, at 45, 452 N. W. 2d, at 566 (Steinmetz, J., dissenting). The dissenters' conclusion in part relied on decisions reached by two State Supreme Courts. *Central Maine Power Co.* v. *Lebanon*, 571 A. 2d 1189 (Me. 1990); *People ex rel. Deukmejian* v. *County of Mendocino*, 36 Cal. 3d 476, 683 P. 2d 1150 (1984). Given the importance of the issue and the conflict of authority, we granted certiorari. 498 U. S. 1045 (1991). We now reverse.

II

Under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. *Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C. J.). The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent. *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133 (1990). Congress' intent to supplant state authority in a

particular field may be express in the terms of the statute. *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). See *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 203–204 (1983). When considering pre-emption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, *supra*, at 230.

Even when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

It is, finally, axiomatic that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985). See, *e. g.*, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973).

III

Applying these principles, we conclude that FIFRA does not pre-empt the town's ordinance either explicitly or implicitly or by virtue of an actual conflict.

A

As the Wisconsin Supreme Court recognized, FIFRA nowhere expressly supersedes local regulation of pesticide use. The court, however, purported to find statutory language "which is indicative" of pre-emptive intent in the statute's provision delineating the "Authority of States." 7 U. S. C. § 136v. The key portions of that provision state:

> "(a) . . . A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> "(b) . . . Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

Also significant, in the court's eyes, was FIFRA's failure to specify political subdivisions in defining "State" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." § 136(aa).

It was not clear to the State Supreme Court, however, "that the statutory language [§§ 136v and 136(aa)] alone evince[d] congress' manifest intent to deprive political subdivisions of authority to regulate pesticides." *Casey*, 154 Wis. 2d, at 25, 452 N. W. 2d, at 557–558. It was nevertheless "possible" to infer from the statutory language alone that pesticide regulation by local entities was pre-empted; and when coupled with its legislative history, that language "unmistakably demonstrates the intent of Congress to pre-empt local ordinances such as that adopted by the Town of Casey." *Id.*, at 28, 452 N. W. 2d, at 559. The court's holding thus

rested on both §§ 136v and 136(aa) and their legislative history; neither the language nor the legislative history would have sufficed alone. There was no suggestion that absent the two critical sections, FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States. Nor have the respondents argued in this Court to that effect. On the other hand, it is sufficiently clear that under the opinion announced by the court below, the State would have been precluded from permitting local authorities to regulate pesticides.

We agree that neither the language of the statute nor its legislative history, standing alone, would suffice to pre-empt local regulation. But it is also our view that, even when considered together, the language and the legislative materials relied on below are insufficient to demonstrate the necessary congressional intent to pre-empt. As for the statutory language, it is wholly inadequate to convey an express pre-emptive intent on its own. Section 136v plainly authorizes the "States" to regulate pesticides and just as plainly is silent with reference to local governments. Mere silence, in this context, cannot suffice to establish a "clear and manifest purpose" to pre-empt local authority. *Rice*, *supra*, at 230. Even if FIFRA's express grant of regulatory authority to the States could not be read as applying to municipalities, it would not follow that municipalities were left with no regulatory authority. Rather, it would mean that localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been pre-empted through actual conflicts with federal law. At a minimum, localities would still be free to regulate subject to the usual principles of pre-emption.

Properly read, the statutory language tilts in favor of local regulation. The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be

entrusted to them" . . . in [its] absolute discretion.'" *Sailors* v. *Board of Ed. of Kent Cty.*, 387 U. S. 105, 108 (1967), quoting *Reynolds* v. *Sims*, 377 U. S. 533, 575 (1964), quoting *Hunter* v. *Pittsburgh*, 207 U. S. 161, 178 (1907). The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" because political subdivisions are components of the very entity the statute empowers. Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the "absolute discretion" of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.

Certainly no other textual basis for pre-emption exists. Mortier, building upon the decision below, contends that other provisions show that Congress made a clear distinction between nonregulatory authority, which it delegated to the States or their political subdivisions, and regulatory authority, which it expressly delegated to the "State[s]" alone. The provisions on which he relies, however, undercut his contention. Section 136t(b), for example, mandates that the EPA Administrator cooperate with "any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this subchapter." As an initial matter, the section does not limit "the provisions of the subchapter" which localities are authorized to carry out to "nonregulatory" provisions. Moreover, to read this provision as pre-empting localities would also require the anomalous result of pre-empting the actions of any agency to the extent it exercised state-delegated powers that included pesticide regulation. Likewise, § 136f(b) requires manufacturers to produce records for the inspection upon the request of any employee of the EPA "or of any State or political subdivision, duly designated by the Administrator." Section 136u(a)(1), however, authorizes the Administrator to "delegate to any State . . . the authority to cooperate in the enforcement of this [Act] through the use of its personnel." If the use of "State"

in FIFRA impliedly excludes subdivisions, it is unclear why the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether.

Mortier, like the court below and other courts that have found pre-emption, attempts to compensate for the statute's textual inadequacies by stressing the legislative history. *Casey*, 154 Wis. 2d, at 25–28, 452 N. W. 2d, at 558–559; *Professional Lawn Care Association*, 909 F. 2d, at 933–934. The evidence from this source, which centers on the meaning of what would become § 136v, is at best ambiguous. The House Agriculture Committee Report accompanying the proposed FIFRA amendments stated that it had "rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H. R. Rep. No. 92–511, p. 16 (1971). While this statement indicates an unwillingness by Congress to grant political subdivisions regulatory authority, it does not demonstrate an intent to prevent the States from delegating such authority to its subdivisions, and still less does it show a desire to prohibit local regulation altogether. At least one other statement, however, concededly goes further. The Senate Committee on Agriculture and Forestry Report states outright that it "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 92–838, p. 16 (1972).

But other Members of Congress clearly disagreed. The Senate Commerce Committee, which also had jurisdiction over the bill, observed that "[w]hile the [Senate] Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate

pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." S. Rep. No. 92–970, p. 27 (1972). To counter the language in the Agriculture and Forestry Committee Report, the Commerce Committee proposed an amendment expressly authorizing local regulation among numerous other, unrelated proposals. This amendment was rejected after negotiations between the two Committees. See 118 Cong. Rec. 32251 (1972); H. R. Conf. Rep. No. 92–1540, p. 33 (1972).

As a result, matters were left with the two principal Committees responsible for the bill in disagreement over whether it pre-empted pesticide regulation by political subdivisions. It is important to note, moreover, that even this disagreement was confined to the pre-emptive effect of FIFRA's authorization of regulatory power to the States in § 136v. None of the Committees mentioned asserted that FIFRA pre-empted the field of pesticide regulation. Like FIFRA's text, the legislative history thus falls far short of establishing that pre-emption of local pesticide regulation was the "clear and manifest purpose of Congress." *Rice*, 331 U. S., at 230. We thus agree with the submission in the *amicus* brief of the United States expressing the views of the EPA, the agency charged with enforcing FIFRA.[4]

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[4] JUSTICE SCALIA's foray into legislative history runs into several problems. For one, his concurrence argues that the House Agriculture Committee made it clear that it wanted localities "out of the picture" because its Report specifies as grounds for rejecting a proposal *permitting* the localities to regulate pesticides the observation that the Federal Government and the 50 States provided an adequate number of regulatory jurisdictions. *Post*, at 617. But the only way to infer that the Committee opposed not only a direct grant of regulatory authority upon localities but also state delegation of authority to regulate would be to suppose that the term "regulatory jurisdictions" meant regulatory for the purposes of exercising any authority at all as opposed to exercising authority derived from a direct

B

Likewise, FIFRA fails to provide any clear and manifest indication that Congress sought to supplant local authority

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federal grant. H. R. Rep. No. 92–511, p. 16 (1971). The language of the Report does not answer this question one way or another.

The concurrence further contends that the Senate Agriculture Committee unequivocally expressed its view that § 136v should be read to deprive localities of regulatory authority over pesticide. This may be true, but it is hardly dispositive. Even if § 136v were sufficiently ambiguous to justify reliance on legislative history, the meaning a committee puts forward must at a minimum be within the realm of meanings that the provision, fairly read, could bear. Here the Report clearly states that § 136v should be read as a prohibition, but it is just as clear that the provision is written exclusively in terms of a grant. No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover "flies" or "mosquitoes," and tell the courts that it really covers "ducks."

Finally, the concurrence suggests that the Senate Commerce Committee Report reconfirmed the views of the two Agriculture Committees that § 136v prohibited local pesticide regulation. *Post*, at 618–620. But the Commerce Committee at no point states, clearly or otherwise, that it *agrees* that the section before it does this. Rather, the Report states that "[w]hile the Agriculture Committee *bill* does not specifically prohibit local governments from regulating pesticides, *the report of that committee* states explicitly that local governments cannot regulate pesticides in any manner." S. Rep. No. 92–970, p. 27 (1972) (emphasis added). The Commerce Committee, indeed, went on to assert its policy differences with its Agriculture counterpart. It did this by attempting to strike at the root of the problem through changing the language of the provision itself. Far from showing agreement with its rival, the Commerce Committee's words and actions show a body that, first, conceded *no* ground on the meaning of the disputed language and then, second, raised the stakes by seeking to insure that the language could go only *its* way. On both the existence and the desirability of a prohibition on local regulation, there can be no doubt that the Commerce and Agriculture Committees stood on the opposite sides of the Senate debate.

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386

over pesticide regulation impliedly. In particular, we reject the position of some courts, but not the court below, that the 1972 amendments transformed FIFRA into a comprehensive statute that occupied the field of pesticide regulation, and that certain provisions opened specific portions of the field to state regulation and much smaller portions to local regulation. See *Professional Lawn Care*, 909 F. 2d, at 933–934; *Maryland Pest Control*, 646 F. Supp., at 110–111; see also Brief for National Pest Control Association et al. as *Amici Curiae* 6–16; Brief for Washington Legal Foundation as *Amicus Curiae* 5–18. On this assumption, it has been argued, § 136v(a) could be viewed as opening the field of general pesticide regulation to the States yet leaving it closed to political subdivisions.

This reasoning is unpersuasive. As an initial matter, it would still have to be shown under ordinary canons of construction that FIFRA's delegation of authority to "State[s]" would not therefore allow the States in turn to redelegate some of this authority to their political subdivisions either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate. We have already noted that § 136v(a) can be plausibly read to contemplate precisely such redelegation. The term "State" is not self-limiting since political subdivisions are merely subordinate components of the whole. The scattered mention of political subdivisions elsewhere in FIFRA does not require their exclusion here. The legislative history is complex and ambiguous.

More importantly, field pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference.

(1805). Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. See, *e. g.*, *Wallace* v. *Parker*, 6 Pet. 680, 687–690 (1832). We suspect that the practice will likewise reach well into the future.

The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling or packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with. See *Monsanto*, 467 U. S., at 991.

Nor does FIFRA otherwise imply pre-emption. While the 1972 amendments turned FIFRA into a "comprehensive regulatory statute," *Monsanto*, *supra*, at 991, the resulting scheme was not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, *supra*, at 230. To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of § 136v(a). FIFRA addresses numerous aspects of pesticide control in considerable detail, in particular: registration and classification, § 136a; applicator certification, § 136b; inspection of pesticide production facilities, §§ 136e and 136g; and the possible ban and seizure of pesticides that are misbranded or otherwise fail to meet federal requirements, § 136k. These provisions reflect the general goal of the 1972 amendments to strengthen existing labeling requirements and ensure that these requirements were followed in practice. § 136k. See *Monsanto*, *supra*, at 991–992. FIFRA nonetheless leaves substantial portions of the field vacant, including the area at issue in this case. FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate reg-

istration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography, and water supply. Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.

In contrast to other implicitly pre-empted fields, the 1972 enhancement of FIFRA does not mean that the use of pesticides can occur "'only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.'" *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S., at 634, quoting *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303 (1944) (Jackson, J., concurring). The specific grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabled products, a narrow pre-emptive overlap might occur. As noted in our discussion of express pre-emption, it is doubtful that Congress intended to exclude localities from the scope of § 136v(a)'s authorization, but however this may be, the type of local regulation at issue here would not fall within any impliedly pre-empted field.

C

Finally, like the EPA, we discern no actual conflict either between FIFRA and the ordinance before us or between FIFRA and local regulation generally. Mortier does not rely, nor could he, on the theory that compliance with the ordinance and FIFRA is a "physical impossibility." *Florida Lime & Avocado Growers*, 373 U. S., at 142–143. Instead, he urges that the town's ordinance stands as an obstacle to the statute's goals of promoting pesticide regulation that is coordinated solely on the federal and state levels, that rests upon some degree of technical expertise, and that does not

unduly burden interstate commerce. Each one of these assertions rests on little more than snippets of legislative history and policy speculations. None of them is convincing.

To begin with, FIFRA does not suggest a goal of regulatory coordination that sweeps either as exclusively or as broadly as Mortier contends. The statute gives no indication that Congress was sufficiently concerned about this goal to require pre-emption of local use ordinances simply because they were enacted locally. Mortier suggests otherwise, quoting legislative history which states that FIFRA establishes "a coordinated Federal-State administrative system to carry out the new program," and raising the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations. H. R. Rep. No. 92–511, at 1–2. As we have made plain, the statute does not expressly or impliedly preclude regulatory action by political subdivisions with regard to local use. To the contrary, FIFRA implies a regulatory partnership between federal, state, *and* local governments. Section 136t(b) expressly states that the Administrator "shall cooperate with . . . any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this [Act] and in securing uniformity of regulations." Nor does FIFRA suggest that any goal of coordination precludes local use ordinances because they were enacted independently of specific state or federal oversight. As we have also made plain, local use permit regulations—unlike labeling or certification—do not fall within an area that FIFRA's "program" pre-empts or even plainly addresses. There is no indication that any coordination which the statute seeks to promote extends beyond the matters with which it deals, or does so strongly enough to compel the conclusion that an independently enacted ordinance that falls outside the statute's reach frustrates its purpose.

FIFRA provides even less indication that local ordinances must yield to statutory purposes of promoting technical

expertise or maintaining unfettered interstate commerce. Once more, isolated passages of legislative history that were themselves insufficient to establish a pre-emptive congressional intent do not by themselves establish legislative goals with pre-emptive effect. See, *e. g.*, S. Rep. No. 92–838, at 16. Mortier nonetheless asserts that local ordinances necessarily rest on insufficient expertise and burden commerce by allowing, among other things, large-scale crop infestation. As with the specter of the gypsy moth, Congress is free to find that local regulation does wreak such havoc and enact legislation with the purpose of preventing it. We are satisfied, however, that Congress has not done so yet.

IV

We hold that FIFRA does not pre-empt the town of Casey's ordinance regulating the use of pesticides. The judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the Court that FIFRA does not pre-empt local regulation, because I agree that the terms of the statute do not alone manifest a pre-emption of the entire field of pesticide regulation. *Ante*, at 611–614. If there *were* field pre-emption, 7 U. S. C. § 136v would be understood not as restricting certain types of state regulation (for which purpose it makes little sense to restrict States but not their subdivisions) but as *authorizing* certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions). But the field-pre-emption question is certainly a close one. Congress' selective use of "State" and "State and political subdivisions thereof" would suggest the authorizing rather than restricting meaning of § 136v, were it not for the inconsistent usage pointed to in Part I of the Court's opinion.

As the Court today recognizes, see *ante*, at 606–607, the Wisconsin justices agreed with me on this point, and would have come out the way that I and the Court do *but for* the Committee Reports contained in FIFRA's legislative history. I think they were entirely right about the tenor of those Reports. Their only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.

Consider how the case would have been resolved if the Committee Reports were taken seriously: The bill to amend FIFRA (H. R. 10729) was reported out of the House Committee on Agriculture on September 25, 1971. According to the accompanying Committee Report:

> "The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H. R. Rep. No. 92–511, p. 16 (1971).

Had the *grounds* for the rejection not been specified, it would be possible to entertain the Court's speculation, *ante*, at 609, that the Committee might have been opposing only *direct* conferral upon localities of authority to regulate, in contrast to state *delegation* of authority to regulate. But once it is specified that an excessive number of regulatory jurisdictions is the problem—that "50 States and the Federal Government" are enough—then it becomes clear that the Committee wanted localities out of the picture, and thought that its bill placed them there.

The House Agriculture Committee's bill was passed by the full House on November 9, 1971, and upon transmittal to the Senate was referred to the Senate Committee on Agriculture and Forestry, which reported it out on June 7, 1972. The accompanying Committee Report both clearly confirms the

foregoing interpretation of the House Committee Report, and clearly endorses the disposition that interpretation produces.

> "[We have] considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concu[r] with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that section [136v], by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*" S. Rep. No. 92–838, pp. 16–17 (1972) (emphasis added).

Clearer committee language "directing" the courts how to interpret a statute of Congress could not be found, and if such a direction had any binding effect, the question of interpretation in this case would be no question at all.

But there is still more. After the Senate Agriculture Committee reported the bill to the floor, it was re-referred to the Committee on Commerce, which reported it out on July 19, 1972. The Report of that Committee, plus the accompanying proposals for amendment of H. R. 10729, *reconfirmed* the interpretation of the Senate and House Agriculture Committees. The Report said:

> "While the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner. Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." S. Rep. No. 92–970, p. 27 (1972).

The Court claims that this passage, plus the amendment that it explains, show that "the two principal Committees responsible for the bill [were] in disagreement over whether it pre-empted pesticide regulation by political subdivisions." *Ante*, at 610. I confess that I am less practiced than others in the science of construing legislative history, but it seems to me that quite the opposite is the case. The Senate Commerce Committee Report does not offer a different *interpretation* of the pre-emptive effect of H. R. 10729. To the contrary, it acknowledges that the Report of the originating Committee "states explicitly that local governments cannot regulate pesticides in any manner," and then proceeds to a statement ("Many local governments now regulate pesticides, etc.") which questions not the *existence* but the *desirability* of that restriction on local regulatory power. And since it agreed with the interpretation but did not agree with the policy, the Senate Commerce Committee proposed an amendment to H. R. 10729, whose purpose, according to its Report, was to "giv[e] local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities." S. Rep. No. 92–970, *supra*, at 27. In a supplemental Report, the Senate Agriculture Committee opposed the Commerce Committee's amendment, which it said would "giv[e] local governments the authority to regulate the sale or use of a pesticide," thereby "vitiat[ing]" the earlier Agriculture Committee Report. S. Rep. No. 92–838, pt. 2, *supra*, at 46–47. This legislative history clearly demonstrates, I think, not (as the

Court would have it) that the two principal Senate Committees disagreed about whether H. R. 10729 pre-empted local regulation, but that they were in complete accord that it *did*, and in disagreement over whether it *ought* to.

Of course that does not necessarily say anything about what Congress as a whole thought. Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House. It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote. Those pertinent portions, though they dominate our discussion today, constituted less than a quarter-page of the 82-page House Agriculture Committee Report, and less than a half-page each of the 74-page Senate Agriculture Committee Report, the 46-page Senate Commerce Committee Report, and the 73-page Senate Agriculture Committee Supplemental Report. Those Reports in turn were a minuscule portion of the total number of reports that the Members of Congress were receiving (and presumably even writing) during the period in question. In the Senate, at least, there was a vote on an amendment (the Commerce Committee proposal) that would have changed the result of the supposed interpretation. But the full Senate could have rejected that *either* because a majority of its Members disagreed with the Commerce Committee's proposed policy; *or* because they disagreed with the Commerce Committee's and the Agriculture Committee's interpretation (and thus thought the amendment superfluous); *or* because they were blissfully ignorant of the entire dispute and simply thought that the Commerce

Committee, by asking for recommittal and proposing 15 amendments, was being a troublemaker; *or* because three different minorities (enough to make a majority) had each of these respective reasons. We have no way of knowing; indeed, we have no way of knowing that they had any *rational* motive at all.

All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law. On the important question before us today, whether that law denies local communities throughout the Nation significant powers of self-protection, we should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports. That is, at least, the way I prefer to proceed.

If I believed, however, that the meaning of a statute is to be determined by committee reports, I would have to conclude that a meaning opposite to our judgment has been commanded three times over—not only by one committee in each House, but by *two* Committees in one of them. Today's decision reveals that, in their judicial application, Committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not. To my mind that is infinitely better than honestly giving them dispositive effect. But it would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all.

* * *

The Court responds to this concurrence in a footnote, *ante*, at 610–612, n. 4, asserting that the legislative history is

really ambiguous. I leave it to the reader to judge. I must reply, however, to the Court's assertion that the "practice of utilizing legislative history reaches well into [our] past," *ante*, at 612, n. 4, for which proposition it cites an opinion written by none other than John Marshall himself, *Wallace* v. *Parker*, 6 Pet. 680 (1832). What the Court neglects to explain is that what it means by the "practice of utilizing legislative history" is *not* the practice of utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text—which is the only practice I object to. Marshall used factual statements in the report of an Ohio legislative committee "as part of the record" in the case, *id.*, at 689, 690, assuming that that was permissible "under the laws of Ohio," *ibid.* I do not object to such use. But that is quite different from the recent practice of relying upon legislative material to provide an authoritative interpretation of a statutory text. That would have shocked John Marshall. As late as 1897, we stated quite clearly that there is "a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318. And even as late as 1953, the practice of using legislative history in that fashion was novel enough that Justice Jackson could dismiss it as a "psychoanalysis of Congress," and a "weird endeavor." *United States* v. *Public Utilities Comm'n of Cal.*, 345 U. S. 295, 319 (concurring opinion). It is, in short, almost entirely a phenomenon of this century—and in its extensive use a very recent phenomenon. See, *e. g.*, Carro & Brann, Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis, 9 J. Legis. 282 (1982); Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 196–197 (1983).

I am depressed if the Court is predicting that the use of legislative history for the purpose I have criticized "will . . .

reach well into the future." But if it is, and its prediction of the future is as accurate as its perception that it is continuing a "practice . . . reach[ing] well into [our] past," I may have nothing to fear.

SCHAD *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 90–5551. Argued February 27, 1991—Decided June 21, 1991

After he was found with a murder victim's vehicle and other belongings, petitioner Schad was indicted for first-degree murder. At trial, the prosecutor advanced both premeditated and felony-murder theories, against which Schad claimed that the circumstantial evidence proved at most that he was a thief, not a murderer. The court refused Schad's request for an instruction on theft as a lesser included offense, but charged the jury on second-degree murder. The jury convicted him of first-degree murder, and he was sentenced to death. The State Supreme Court affirmed, rejecting Schad's contention that the trial court erred in not requiring the jury to agree on a single theory of first-degree murder. The court also rejected Schad's argument that *Beck* v. *Alabama*, 447 U. S. 625, required an instruction on the lesser included offense of robbery.

Held: The judgment is affirmed.

163 Ariz. 411, 788 P. 2d 1162, affirmed.

JUSTICE SOUTER delivered the opinion of the Court with respect to Part III, concluding that *Beck*, *supra*—which held unconstitutional a state statute prohibiting lesser included offense instructions in capital cases—did not entitle Schad to a jury instruction on robbery. *Beck* was based on the concern that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital offense might nonetheless vote for a capital conviction if the only alternative was to set him free with no punishment at all. See *id.*, at 629, 630, 632, 634, 637, 642–643, and n. 19. This concern simply is not implicated here, since the jury was given the "third option" of finding Schad guilty of a lesser included noncapital offense, second-degree murder. It would be irrational to assume that the jury chose capital murder rather than second-degree murder as its means of keeping a robber off the streets, and, thus, the trial court's choice of instructions sufficed to ensure the verdict's reliability. Pp. 645–648.

JUSTICE SOUTER, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY, concluded in Part II that Arizona's characterization of first-degree murder as a single crime as to which a jury need not agree on one of the alternative statutory theories of premeditated or felony murder is not unconstitutional. Pp. 630–645.

(a) The relevant enquiry is not, as Schad argues, whether the Constitution requires a unanimous jury in state capital cases. Rather, the real question here is whether it was constitutionally acceptable to permit the jury to reach one verdict based on any combination of the alternative findings. Pp. 630–631.

(b) The long-established rule that a jury need not agree on which overt act, among several, was the means by which a crime was committed, provides a useful analogy. Nevertheless, the Due Process Clause does place limits on a State's capacity to define different states of mind as merely alternative means of committing a single offense; there is a point at which differences between those means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating between what the Constitution requires to be treated as separate offenses subject to separate jury findings. Pp. 631–637.

(c) It is impossible to lay down any single test for determining when two means are so disparate as to exemplify two inherently separate offenses. Instead, the concept of due process, with its demands for fundamental fairness and for the rationality that is an essential component of that fairness, must serve as the measurement of the level of definitional and verdict specificity permitted by the Constitution. Pp. 637–638.

(d) The relevant enquiry must be undertaken with a threshold presumption of legislative competence. Decisions about what facts are material and what are immaterial, or, in terms of *In re Winship*, 397 U. S. 358, 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. There is support for such restraint in this Court's "burden-shifting" cases, which have made clear, in a slightly different context, that the States must be permitted a degree of flexibility in determining what facts are necessary to constitute a particular offense within the meaning of *Winship*. See, *e. g.*, *Patterson* v. *New York*, 432 U. S. 197, 201–202, 210. Pp. 638–639.

(e) In translating the due process demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, courts should look both to history and widely shared state practice as guides to fundamental values. See, *e. g.*, *id.*, at 202. Thus it is significant here that Arizona's equation of the mental states of premeditated and felony murder as a species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. See, *e. g.*, *People* v. *Sullivan*, 173 N. Y. 122, 127, 65 N. E. 989, 989–990; *State* v. *Buckman*, 237 Neb. 936, 468 N. W. 2d 589. Pp. 640–643.

(f) Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found. See *Tison* v. *Arizona*, 481 U. S. 137, 157–158. This is enough to rule out the argument that a moral disparity bars treating the two mental states as alternative means to satisfy the mental element of a single offense. Pp. 643–644.

(g) Although the foregoing considerations may not exhaust the universe of those potentially relevant, they are sufficiently persuasive that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality. P. 645.

JUSTICE SCALIA would reach the same result as the plurality with respect to Schad's verdict-specificity claim, but for a different reason. It has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. As the plurality observes, one can conceive of novel "umbrella" crimes that could not, consistent with due process, be submitted to a jury on disparate theories. But first-degree murder, which has in its basic form existed in our legal system for centuries, does not fall into that category. Such a traditional crime, and a traditional mode of submitting it to the jury, do not need to pass this Court's "fundamental fairness" analysis; and the plurality provides no persuasive justification other than history in any event. Pp. 648–652.

SOUTER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts I and II, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 648. WHITE, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 652.

Denise I. Young argued the cause for petitioner. With her on the briefs was *John M. Bailey*.

R. Wayne Ford, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the brief were *Robert K. Corbin*, Attorney General, and *Ronald L. Crismon*.*

*Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Joel M. Gershowitz*; and for the

JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, and an opinion with respect to Parts I and II, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join.

This case presents two questions: whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional; and whether the principle recognized in *Beck* v. *Alabama*, 447 U. S. 625 (1980), entitles a defendant to instructions on all offenses that are lesser than, and included within, a capital offense as charged. We answer no to each.

I

On August 9, 1978, a highway worker discovered the badly decomposed body of 74-year-old Lorimer Grove in the underbrush off U. S. Highway 89, about nine miles south of Prescott, Arizona. There was a rope around his neck, and a coroner determined that he had been strangled to death. The victim had left his home in Bisbee, Arizona, eight days earlier, driving his new Cadillac and towing a camper.

Commonwealth of Kentucky et al. by *Frederick J. Cowan*, Attorney General of Kentucky, and *Denise A. Garrison* and *Ian G. Sonego*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *John K. Van de Kamp* of California, *John J. Kelly* of Connecticut, *Charlie M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *James T. Jones* of Idaho, *Linley E. Pearson* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Michael C. Moore* of Mississippi, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Brian McKay* of Nevada, *Robert J. Del Tufo* of New Jersey, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert H. Henry* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Roger Tellinghuisen* of South Dakota, *Charles Burson* of Tennessee, *R. Paul Van Dam* of Utah, and *Mary Sue Terry* of Virginia.

On September 3, 1978, petitioner, driving Grove's Cadillac, was stopped for speeding by the New York State Police. He told the officers that he was transporting the car for an elderly friend named Larry Grove. Later that month, petitioner was arrested in Salt Lake City, Utah, for a parole violation and possession of a stolen vehicle. A search of the Cadillac, which petitioner was still driving, revealed personal belongings of Grove's, and petitioner's wallet contained two of Grove's credit cards, which petitioner had begun using on August 2, 1978. Other items belonging to Grove were discovered in a rental car which had been found abandoned off Highway 89 on August 3, 1978; petitioner had rented the car the previous December and never returned it. While in custody in Salt Lake City, petitioner told a visitor that he would "'deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona.'" 163 Ariz. 411, 414, 788 P. 2d 1162, 1165 (1989).

A Yavapai County, Arizona, grand jury indicted petitioner on one count of first-degree murder, and petitioner was extradited to stand trial. The Arizona statute applicable to petitioner's case defined first-degree murder as "murder which is . . . wilful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery." Ariz. Rev. Stat. Ann. § 13–452 (Supp. 1973).[1] Petitioner was convicted and sentenced to death,

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[1] The full statute provided:

"A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree."

The statute has since been revised, but both premeditated murder and murder in the course of a robbery still constitute first-degree murder. See Ariz. Rev. Stat. Ann. § 13–1105.A (1989).

but his conviction was set aside on collateral review. 142 Ariz. 619, 691 P. 2d 710 (1984).

At petitioner's retrial, the prosecutor advanced theories of both premeditated murder and felony murder, against which petitioner claimed that the circumstantial evidence proved at most that he was a thief, not a murderer. The court instructed the jury that "[f]irst degree murder is murder which is the result of premeditation. . . . Murder which is committed in the attempt to commit robbery is also first degree murder." App. 26. The court also instructed that "[a]ll 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty." *Id.*, at 27.

The defense requested a jury instruction on theft as a lesser included offense. The court refused, but did instruct the jurors on the offense of second-degree murder, and gave them three forms for reporting a verdict: guilty of first-degree murder; guilty of second-degree murder; and not guilty. The jury convicted petitioner of first-degree murder, and, after a further hearing, the judge sentenced petitioner to death.

The Arizona Supreme Court affirmed. 163 Ariz. 411, 788 P. 2d 1162 (1989). The court rejected petitioner's contention that the trial court erred in not requiring the jury to agree on a single theory of first-degree murder, explaining:

> "'In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.'" *Id.*, at 417; 788 P. 2d, at 1168 (quoting *State* v. *Encinas*, 132 Ariz. 493, 496, 647 P. 2d 624, 627 (1982)) (citations omitted).

The court also rejected petitioner's argument that *Beck* v. *Alabama*, *supra*, required an instruction on the lesser in-

cluded offense of robbery. 163 Ariz., at 416–417, 788 P. 2d, at 1167–1168.

We granted certiorari. 498 U. S. 894 (1990).

II

Petitioner's first contention is that his conviction under instructions that did not require the jury to agree on one of the alternative theories of premeditated and felony murder is unconstitutional.[2] He urges us to decide this case by holding that the Sixth, Eighth, and Fourteenth Amendments require a unanimous jury in state capital cases, as distinct from those where lesser penalties are imposed. See *Johnson* v. *Louisiana*, 406 U. S. 356 (1972); *Apodaca* v. *Oregon*, 406 U. S. 404 (1972). We decline to do so, however, because the suggested reasoning would beg the question raised. Even assuming a requirement of jury unanimity *arguendo*, that assumption would fail to address the issue of what the jury must be unanimous about. Petitioner's jury was unanimous in deciding that the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings. If it was, then the jury was unanimous in reaching the verdict, and petitioner's proposed unanimity rule would not help him. If it was not, and the jurors may not combine findings of premeditated and felony murder, then petitioner's conviction will fall even without his proposed rule, because the instructions allowed for the forbidden combination.

In other words, petitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime as to

[2] Respondent contends that petitioner waived this contention by failing to raise it in the lower Arizona courts. Brief for Respondent 8–10. The Arizona Supreme Court, however, addressed the contention on the merits, 163 Ariz. 411, 417, 788 P. 2d 1162, 1168 (1989), thereby preserving the issue for our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

which a verdict need not be limited to any one statutory alternative, as against which he argues that premeditated murder and felony murder are separate crimes as to which the jury must return separate verdicts. The issue in this case, then, is one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity.

A

A way of framing the issue is suggested by analogy. Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. In *Andersen* v. *United States*, 170 U. S. 481 (1898), for example, we sustained a murder conviction against the challenge that the indictment on which the verdict was returned was duplicitous in charging that death occurred through both shooting and drowning. In holding that "the Government was not required to make the charge in the alternative," *id.*, at 504, we explained that it was immaterial whether death was caused by one means or the other. Cf. *Borum* v. *United States*, 284 U. S. 596 (1932) (upholding the murder conviction of three codefendants under a count that failed to specify which of the three did the actual killing); *St. Clair* v. *United States*, 154 U. S. 134, 145 (1894). This fundamental proposition is embodied in Federal Rule of Criminal Procedure 7(c)(1), which provides that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means."

We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the

bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *McKoy* v. *North Carolina*, 494 U. S. 433, 449 (1990) (BLACKMUN, J., concurring) (footnotes omitted).

The alternatives in the cases cited went, of course, to possibilities for proving the requisite *actus reus*, while the present case involves a general verdict predicated on the possibility of combining findings of what can best be described as alternative mental states, the one being premeditation, the other the intent required for murder combined with the commission of an independently culpable felony. See *State* v. *Serna*, 69 Ariz. 181, 188, 211 P. 2d 455, 459 (1949) (in Arizona, the attempt to commit a robbery is "the legal equivalent of . . . deliberation, premeditation, and design").[3] We see no reason, however, why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*.

That is not to say, however, that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred. The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, see *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939) (citing *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926)), carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge

[3] See also Wechsler, A Rationale of the Law of Homicide: I, 37 Colum. L. Rev. 701, 702–703 (1937); Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 926 (1939).

against him. Thus it is an assumption of our system of criminal justice "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958) (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)), that no person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, see *United States* v. *UCO Oil Co.*, 546 F. 2d 833 (CA9 1976), cert. denied, 430 U. S. 966 (1977), nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.[4]

To say, however, that there are limits on a State's authority to decide what facts are indispensable to proof of a given offense is simply to raise the problem of describing the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses. See generally Note, 91 Harv. L. Rev. 499, 501–502 (1977). Although we have never before attempted to define what constitutes an immaterial difference as to mere means and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings, there is a body of law in the federal circuits, deriving primarily from the decision of the Fifth Cir-

[4] Although our vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice, the principle is not dependent upon, or limited by, concerns about vagueness. A charge allowing a jury to combine findings of embezzlement and murder would raise identical problems regardless of how specifically embezzlement and murder were defined.

cuit in *United States* v. *Gipson*, 553 F. 2d 453 (1977) (Wisdom, J.), that addresses this problem.

The defendant in *Gipson* was charged with violating 18 U. S. C. §2313 (1982 ed.), which prohibited knowingly "receiv[ing], conceal[ing], stor[ing], barter[ing], sell[ing] or dispos[ing] of" any stolen vehicle or aircraft moving in interstate commerce, and was convicted after the trial judge charged the jury that it need not agree on which of the enumerated acts the defendant had committed. The Fifth Circuit reversed, reasoning that the defendant's right to "jury consensus as to [his] course of action"[5] was violated by the joinder in a single count of "two distinct conceptual groupings," receiving, concealing, and storing forming the first grouping (referred to by the court as "housing"), and bartering, selling, and disposing ("marketing") constituting the second. *Id.*, at 456–459. In that court's view, the acts within a conceptual grouping are sufficiently similar to obviate the need for jurors to agree about which of them was committed, whereas the acts in distinct conceptual groupings are so unrelated that the jury must decide separately as to each grouping. A number of lower courts have adopted the standard of "distinct conceptual groupings" as the appropriate test. *E. g.*, *United States* v. *Peterson*, 768 F. 2d 64 (CA2) (Friendly, J.), cert. denied, 474 U. S. 923 (1985); *United States* v. *Duncan*, 850 F. 2d 1104, 1113 (CA6 1988), cert. de-

[5]The court identified this right as a concomitant of the federal criminal defendant's Sixth Amendment right to a unanimous verdict, and subsequent courts following *Gipson* have adopted that characterization. *E. g.*, *United States* v. *Beros*, 833 F. 2d 455 (CA3 1987). For the reasons given earlier, we think the right is more accurately characterized as a due process right than as one under the Sixth Amendment. Although this difference in characterization is important in some respects (chiefly, because a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict, see *Johnson* v. *Louisiana*, 406 U. S. 356 (1972); *Apodaca* v. *Oregon*, 406 U. S. 404 (1972)), it is immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary.

nied *sub nom. Downing* v. *United States*, 493 U. S. 1025 (1990); *State* v. *Baldwin*, 101 Wis. 2d 441, 449–450, 304 N. W. 2d 742, 747–749 (1981).

We are not persuaded that the *Gipson* approach really answers the question, however. Although the classification of alternatives into "distinct conceptual groupings" is a way to express a judgment about the limits of permissible alternatives, the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions. See, *e. g.*, *Rice* v. *State*, 311 Md. 116, 133, 532 A. 2d 1357, 1365 (1987) (criticizing *Gipson* criteria as "not entirely clear" and as "provid[ing] little guidance"); Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues, 36 Okla. L. Rev. 473, 548–549 (1983) (same). This is so because conceptual groupings may be identified at various levels of generality, and we have no *a priori* standard to determine what level of generality is appropriate. Indeed, as one judge has noted, even on the facts of *Gipson* itself, "[o]ther conceptual groupings of the six acts are possible. [One might] put all six acts into one conceptual group, namely trafficking in stolen vehicles." *Manson* v. *State*, 101 Wis. 2d 413, 438, 304 N. W. 2d 729, 741 (1981) (Abrahamson, J., concurring); accord, Trubitt, *supra*, at 548–549 ("[I]t is difficult to see how a court could determine that 'housing' and 'marketing' are ultimate acts in some metaphysical or constitutional sense, and thus prohibit the legislature from including them in the single offense of trafficking"). In short, the notion of "distinct conceptual groupings" is simply too conclusory to serve as a real test.

The dissent would avoid the indeterminacy of the *Gipson* approach by adopting an inflexible rule of maximum verdict specificity. In the dissent's view, whenever a statute lists alternative means of committing a crime, "the jury [must] indicate on which of the alternatives it has based the defendant's guilt," *post*, at 656, even where there is no indication

that the statute seeks to create separate crimes. This approach rests on the erroneous assumption that any statutory alternatives are *ipso facto* independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime. See *post*, at 656–658 (citing *In re Winship*, 397 U. S. 358 (1970), and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979)). In point of fact, as the statute at issue in *Gipson* demonstrates, legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes.[6] The question whether statutory alternatives constitute independent elements of the offense therefore does not, as the dissent would have it, call for a mere tautology; rather, it is a substantial question of statutory construction. See, *e. g.*, *United States* v. *UCO Oil Co.*, 546 F. 2d, at 835–838.

In cases, like this one, involving state criminal statutes, the dissent's "statutory alternatives" test runs afoul of the fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts. If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law. See *Mullaney* v. *Wilbur*, 421 U. S. 684, 690–691 (1975) (declining to reexamine the Maine

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[6] Because statutes frequently enumerate alternatives that clearly are mere means of satisfying a single element of an offense, adoption of the dissent's approach of requiring a specific verdict as to every alternative would produce absurd results. For example, the Arizona first-degree murder statute at issue here prohibited, *inter alia*, "wilful, deliberate *or* premeditated killing." Ariz. Rev. Stat. Ann. § 13–452 (Supp. 1973) (emphasis added). Under the dissent's approach, juries in prosecutions brought under the statute presumably should have been required to deliver specific verdicts as to each of the three: wilfullness, deliberation, and premeditation.

Supreme Judicial Court's decision that, under Maine law, all intentional or criminally reckless killings are aspects of the single crime of felonious homicide); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). In the present case, for example, by determining that a general verdict as to first-degree murder is permissible under Arizona law, the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single *mens rea* element. The issue in this case therefore is not whether "the State must be held to its choice," *post*, at 657–658, for the Arizona Supreme Court has authoritatively determined that the State has chosen not to treat premeditation and the commission of a felony as independent elements of the crime, but rather whether Arizona's choice is unconstitutional.

B

It is tempting, of course, to follow the example of *Gipson* to the extent of searching for some single criterion that will serve to answer the question facing us. We are convinced, however, of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands for fundamental fairness, see, *e. g.*, *Dowling* v. *United States*, 493 U. S. 342, 352–353 (1990), and for the rationality that is an essential component of that fairness. In translating these demands for fairness and rationality into concrete judgments about the adequacy of legislative determinations, we look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the *mens rea* element of a single offense. The enquiry is undertaken with a threshold presumption of legis-

lative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.

1

Judicial restraint necessarily follows from a recognition of the impossibility of determining, as an *a priori* matter, whether a given combination of facts is consistent with there being only one offense. Decisions about what facts are material and what are immaterial, or, in terms of *Winship*, *supra*, at 364, what "fact[s] [are] necessary to constitute the crime," and therefore must be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court. Respect for this legislative competence counsels restraint against judicial second-guessing, cf. *Rostker* v. *Goldberg*, 453 U. S. 57, 65 (1981) ("[L]ack of competence on the part of the courts" relative to the legislature so counsels), which is particularly appropriate in cases, like this one, that call state definitions into question. "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine* v. *California*, 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson* v. *New York*, 432 U. S. 197, 201 (1977).

There is support for such restraint in our "burden-shifting" cases, which have made clear, in a slightly different context, that the States must be permitted a degree of flexibility in defining the "fact[s] necessary to constitute the crime" under *Winship*. Each of those cases arose because a State defined an offense in such a way as to exclude some particular fact from those to be proved beyond a reasonable doubt, either by placing the burden on defendants to prove a mitigating fact, see *Patterson*, *supra* (extreme emotional disturbance); *Martin* v. *Ohio*, 480 U. S. 228 (1987) (self-defense); see also *Mul-*

laney, *supra* (heat of passion or sudden provocation), or by allowing the prosecution to prove an aggravating fact by some standard less than that of reasonable doubt, *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (possession of a firearm). In each case, the defendant argued that the excluded fact was inherently "a fact necessary to constitute the offense" that required proof beyond a reasonable doubt under *Winship*, even though the fact was not formally an element of the offense with which he was charged. See, *e. g.*, *id.*, at 90.

The issue presented here is similar, for under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a *mens rea* element of high culpability. The essence of petitioner's argument is that, despite this unitary definition of the offense, each of these means must be treated as an independent element as to which the jury must agree, because premeditated murder and felony murder are inherently separate offenses. Both here and in the burden-shifting cases, in other words, a defendant argues that the inherent nature of the offense charged requires the State to prove as an element of the offense some fact that is not an element under the legislative definition.

In the burden-shifting cases, as here, we have faced the difficulty of deciding, as an abstract matter, what elements an offense must comprise. Recognizing "[o]ur inability to lay down any 'bright line' test," *McMillan*, 477 U. S., at 91, we have "stressed that . . . the state legislature's definition of the elements of the offense is usually dispositive." *Id.*, at 85; see also *Patterson*, *supra*, at 201–202. We think that similar restraint is appropriate here, although we recognize that, as in the burden-shifting cases, "there are obviously constitutional limits beyond which the States may not go." *Patterson*, *supra*, at 210; see also *McMillan*, *supra*, at 86.

The use here of due process as a measurement of the sense of appropriate specificity assumes the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require. In turning to these sources we again follow the example set in the burden-shifting cases, where we have often found it useful to refer both to history and to the current practice of other States in determining whether a State has exceeded its discretion in defining offenses. See *Patterson*, *supra*, at 202, 207–209, nn. 10–11; see also *Martin*, *supra*, at 235–236; *Mullaney*, 421 U. S., at 692–696. Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history[7] or in the criminal law of other jurisdictions will lighten the defendant's burden.

Thus, it is significant that Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes. At common law, murder was defined as the unlawful killing of another human being with "malice aforethought." The intent to kill and the intent to commit a felony were alternative aspects of the single concept of "malice aforethought." See 3 J. Stephen, History of the Criminal Law of England 21–22 (1883). Although American jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have

[7] We note, however, the perhaps obvious proposition that history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases, like this one, that deal with crimes that existed at common law.

in most cases retained premeditated murder and some form of felony murder (invariably including murder committed in perpetrating or attempting to perpetrate a robbery) as alternative means of satisfying the mental state that first-degree murder presupposes. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.5, pp. 210–211, and nn. 21, 23, 24 (1986); ALI, Model Penal Code § 210.2, p. 32, and n. 78 (1980). Indeed, the language of the Arizona first-degree murder statute applicable here is identical in all relevant respects to the language of the first statute defining murder by differences of degree, passed by the Pennsylvania Legislature in 1794.[8]

A series of state-court decisions, beginning with the leading case of *People* v. *Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903), have agreed that "it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or an attempt to commit one; it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first degree as that offense is defined by the statute." *Id.*, at 127, 65 N. E., at 989–990. See *People* v. *Milan*, 9 Cal. 3d 185, 507 P. 2d 956 (1973); *People* v. *Travis*, 170 Ill. App. 3d 873, 525 N. E. 2d 1137 (1988), cert. denied, 489 U. S. 1024 (1989); *State* v. *Fuhrmann*, 257 N. W. 2d 619 (Iowa 1977); *State* v. *Wilson*, 220 Kan. 341, 552 P. 2d 931 (1976); *Commonwealth* v. *Devlin*, 335 Mass. 555, 141 N. E. 2d 269 (1957); *People* v. *Embree*, 70 Mich. App.

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[8] The Pennsylvania statute provided:

"[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree." 1794 Pa. Laws, ch. 1766, § 2.

382, 246 N. W. 2d 6 (1976); *State* v. *Buckman*, 237 Neb. 936, 468 N. W. 2d 589 (1991); *James* v. *State*, 637 P. 2d 862 (Okla. Crim. 1981); *State* v. *Tillman*, 750 P. 2d 546 (Utah 1987); see also *Brown* v. *State*, 473 So. 2d 1260 (Fla.), cert. denied, 474 U. S. 1038 (1985). Although the state courts have not been unanimous in this respect, see *State* v. *Murray*, 308 Ore. 496, 782 P. 2d 157 (1989), there is sufficiently widespread acceptance of the two mental states as alternative means of satisfying the *mens rea* element of the single crime of first-degree murder to persuade us that Arizona has not departed from the norm.

Such historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong indication that they do not "'offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson*, 432 U. S., at 202 (quoting *Speiser*, 357 U. S., at 523), for we recognize the high probability that legal definitions, and the practices comporting with them, are unlikely to endure for long, or to retain wide acceptance, if they are at odds with notions of fairness and rationality sufficiently fundamental to be comprehended in due process. Cf. *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922) (Holmes, J.); *Snyder*, 291 U. S., at 111.

This is not to say that either history or current practice is dispositive. In *McMillan*, for example, even though many States had made the fact at issue (possession of a weapon) an element of various aggravated offenses, we were unwilling to conclude that Pennsylvania's decision to treat it as an aggravating circumstance provable at sentencing by a mere preponderance of the evidence deviated so far from the constitutional norm as to violate the Due Process Clause. "That Pennsylvania's particular approach has been adopted in few other States," we observed, "does not render Pennsylvania's choice unconstitutional." 477 U. S., at 90; see also *Martin*, 480 U. S., at 235–236 (relying on history, but not current practice); *Patterson*, *supra*, at 211. Conversely, "'neither

the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.'" *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 18 (1991) (quoting *Williams* v. *Illinois*, 399 U. S. 235, 239 (1970)). In fine, history and current practice are significant indicators of what we as a people regard as fundamentally fair and rational ways of defining criminal offenses, which are nevertheless always open to critical examination.

3

It is, as we have said, impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses. In the case before us, however, any scrutiny of the two possibilities for proving the *mens rea* of first-degree murder may appropriately take account of the function that differences of mental state perform in defining the relative seriousness of otherwise similar or identical criminal acts. See generally ALI, Model Penal Code § 2.02(2) (1985) (defining differing mental states). If, then, two mental states are supposed to be equivalent means to satisfy the *mens rea* element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether. Petitioner has made out no case for such moral disparity in this instance.

The proper critical question is not whether premeditated murder is necessarily the moral equivalent of felony murder in all possible instances of the latter. Our cases have recognized that not all felony murders are of identical culpability, compare *Tison* v. *Arizona*, 481 U. S. 137 (1987), with *Enmund* v. *Florida*, 458 U. S. 782 (1982), and the same point is suggested by examining state murder statutes, which frequently diverge as to what felonies may be the predicate of a felony-murder conviction. Compare, *e. g.*, Tenn. Code Ann.

§ 39–13–202 (Supp. 1990) (theft as predicate of first-degree felony murder) with, *e. g.*, Ariz. Rev. Stat. Ann. § 13–1105.A (1989) (theft not such a predicate).

The question, rather, is whether felony murder may ever be treated as the equivalent of murder by deliberation, and in particular whether robbery murder as charged in this case may be treated as thus equivalent. This is in fact the very question we considered only three Terms ago in the context of our capital sentencing jurisprudence in *Tison*, *supra*. There we held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents [such] a highly culpable mental state . . . that [it] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though not inevitable, lethal result." *Id.*, at 157–158. We accepted the proposition that this disregard occurs, for example, when a robber "shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property." *Id.*, at 157. Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.[9]

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[9] The dissent's focus on the "risks of different punishment," *post*, at 658, and n. 4, for premeditated and felony murder, ignores the fact that the Arizona sentencing statute applicable to petitioner, Ariz. Rev. Stat. Ann. § 13–453 (Supp. 1973), authorized the same maximum penalty (death) for both means of committing first-degree murder. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 87–88 (1986) (relying on fact that under Pennsylvania law possession of a weapon "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty"). Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's

We would not warrant that these considerations exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense. But they do suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality. We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable, and in fact the Supreme Court of Arizona has itself recognized that separate verdict forms are useful in cases submitted to a jury on alternative theories of premeditated and felony murder. *State* v. *Smith*, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989). We hold only that the Constitution did not command such a practice on the facts of this case.

III

Petitioner's second contention is that under *Beck* v. *Alabama*, 447 U. S. 625 (1980), he was entitled to a jury instruction on the offense of robbery, which he characterizes as a lesser included offense of robbery murder.[10] *Beck* held unconstitutional an Alabama statute that prohibited lesser in-

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findings to provide a proper premise for the decision whether or not to impose the death penalty, *post*, at 658–659, goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction. To make the point by example, even if the trial judge in this case had satisfied any possible specific verdict concerns by instructing the jurors that they were required to agree on a single theory of the crime, the dissent's "insufficient sentencing information" concern would remain unless the judge had also taken the additional step (a step unrelated to petitioner's right to jury agreement on his specific conduct) of requiring them to return separate forms of verdict. The only relevant question for present purposes is what the jury must decide, not what information it must provide the sentencing judge.

[10] Petitioner also contends that the jury should have been instructed on the offense of theft, against which respondent argues that any claim for a lesser included theft offense instruction was waived. Given respondent's concession that petitioner has preserved his claim for a robbery instruction, and our view of the scope of *Beck*, see *infra*, at 646–648, there is no need to resolve this waiver issue.

cluded offense instructions in capital cases. Unlike the jury in *Beck*, the jury here was given the option of finding petitioner guilty of a lesser included noncapital offense, second-degree murder. While petitioner cannot, therefore, succeed under the strict holding of *Beck*, he contends that the due process principles underlying *Beck* require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case.

Petitioner misapprehends the conceptual underpinnings of *Beck*. Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. We explained:

> "[O]n the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty [in Alabama] may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. . . . [T]hese two extraneous factors . . . . introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 642 (footnote omitted).

We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented. See *id.*, at 629, 630, 632, 634, 637, 642–643, and n. 19. As we later explained in *Spaziano* v. *Florida*, 468 U. S. 447, 455 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process

that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." See also *Hopper* v. *Evans*, 456 U. S. 605, 609 (1982). This central concern of *Beck* simply is not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence.

Petitioner makes much of the fact that the theory of his defense at trial was not that he murdered Mr. Grove without premeditation (which would have supported a second-degree murder conviction), but that, despite his possession of some of Mr. Grove's property, someone else had committed the murder (which would have supported a theft or robbery conviction, but not second-degree murder). Petitioner contends that if the jurors had accepted his theory, they would have thought him guilty of robbery and innocent of murder, but would have been unable to return a verdict that expressed that view. Because *Beck* was based on this Court's concern about "rules that diminish the reliability of the guilt determination" in capital cases, 447 U. S., at 638, the argument runs, the jurors should have been given the opportunity "to return a verdict in conformity with their reasonable view of the evidence." Reply Brief for Petitioner 8. The dissent makes a similar argument. *Post*, at 660.

The argument is unavailing, because the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that

the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

That is not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one without any support in the evidence. Cf. *Roberts* v. *Louisiana*, 428 U. S. 325, 334–335 (1976) (plurality opinion). In the present case, however, petitioner concedes that the evidence would have supported a second-degree murder conviction, Brief for Petitioner 18–19, and that is adequate to indicate that the verdict of capital murder represented no impermissible choice.

The judgment of the Supreme Court of Arizona is

Affirmed.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

The crime for which a jury in Yavapai County, Arizona, convicted Edward Harold Schad in 1985 has existed in the Anglo-American legal system, largely unchanged, since at least the early 16th century, see 3 J. Stephen, A History of the Criminal Law of England 45 (1883); R. Moreland, Law of Homicide 9–10 (1952). The common-law crime of murder was the unlawful killing of a human being by a person with "malice aforethought" or "malice prepense," which consisted of an intention to kill or grievously injure, knowledge that an act or omission would probably cause death or grievous injury, an intention to commit a felony, or an intention to resist lawful arrest. Stephen, *supra*, at 22; see also 4 W. Blackstone, Commentaries 198–201 (1769); 1 M. Hale, Pleas of the Crown 451–466 (1st Am. ed. 1847).

The common law recognized no degrees of murder; all unlawful killing with malice aforethought received the same punishment—death. See F. Wharton, Law of Homicide 147 (3d ed. 1907); Moreland, *supra*, at 199. The rigor of this rule led to widespread dissatisfaction in this country. See *McGautha* v. *California*, 402 U. S. 183, 198 (1971). In 1794,

Pennsylvania divided common-law murder into two offenses, defining the crimes thus:

> "[A]ll murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree." 1794 Pa. Laws, ch. 1766, § 2.

That statute was widely copied, and down to the present time the United States and most States have a single crime of first-degree murder that can be committed by killing in the course of a robbery as well as premeditated killing. See, *e. g.*, 18 U. S. C. § 1111; Cal. Penal Code Ann. § 189 (West 1988 and Supp. 1991); Kan. Stat. Ann. § 21.3401 (Supp. 1990); Mich. Comp. Laws Ann. § 750.316 (West 1991); Neb. Rev. Stat. § 28–303 (1989).* It is Arizona's variant of the 1794 Pennsylvania statute under which Schad was convicted in 1985 and which he challenges today.

Schad and the dissenting Justices would in effect have us abolish the crime of first-degree murder and declare that the Due Process Clause of the Fourteenth Amendment requires the subdivision of that crime into (at least) premeditated murder and felony murder. The plurality rejects that course—correctly, but not in my view for the correct reason.

As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. See, *e. g.*, *People* v. *Sullivan*, 173 N. Y. 122, 65 N. E. 989 (1903); cf. H. Joyce, Indictments §§ 561–562, pp. 654–657 (2d ed. 1924); W. Mikell, Clark's Criminal Procedure §§ 99–103,

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*Still other States never established degrees of murder and retain a single crime of "murder" that encompasses both premeditated killing and killing in the course of a robbery. See, *e. g.*, S. C. Code § 16–3–10 (1985).

pp. 322–330 (2d ed. 1918); 1 J. Bishop, Criminal Procedure §§ 434–438, pp. 261–265 (2d ed. 1872). That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her. While that seems perfectly obvious, it is also true, as the plurality points out, see *ante*, at 633, that one can conceive of novel "umbrella" crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process.

The issue before us is whether the present crime falls into the former or the latter category. The plurality makes heavy weather of this issue, because it starts from the proposition that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack," *ante*, at 642–643 (internal quotation marks omitted). That is true enough with respect to some constitutional attacks, but not, in my view, with respect to attacks under either the procedural component, see *Pacific Mut. Life Insurance Co.* v. *Haslip*, 499 U. S. 1, 28–38 (1991) (SCALIA, J., concurring in judgment), or the so-called "substantive" component, see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 121–130 (1989) (plurality opinion), of the Due Process Clause. It is precisely the historical practices that *define* what is "due." "Fundamental fairness" analysis may appropriately be applied to *departures* from traditional American conceptions of due process; but when judges test their individual notions of "fairness" against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges.

And that is the case here. Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of "fundamental fairness" review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today. Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is "due."

If I did not believe that, I might well be with the dissenters in this case. Certainly the plurality provides no satisfactory explanation of why (apart from the endorsement of history) it is permissible to combine in one count killing in the course of robbery and killing by premeditation. The only point it makes is that the depravity of mind required for the two may be considered morally equivalent. *Ante*, at 643–645. But the petitioner here does not complain about lack of moral equivalence: He complains that, as far as we know, only six jurors *believed* he was participating in a robbery, and only six *believed* he intended to kill. Perhaps moral equivalence is a *necessary* condition for allowing such a verdict to stand, but surely the plurality does not pretend that it is *sufficient*. (We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the "moral equivalence" of those two acts.) Thus, the plurality approves the Arizona practice in the present case because it meets *one* of the conditions for constitutional validity. It does not say what the *other* conditions are, or why the Arizona practice meets them. With respect, I do not think this delivers the "critical examination," *ante*, at 643, which the plurality promises as a substitute for reliance upon historical practice. In fact, I think its analysis ultimately relies upon nothing but historical practice (whence does it derive even the "moral equivalence" requirement?)—

but to acknowledge that reality would be to acknowledge a rational limitation upon our power, which bobtailed "critical examination" obviously is not. "Th[e] requirement of [due process] is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land." *Walker* v. *Sauvinet*, 92 U. S. 90, 93 (1876) (citation omitted).

With respect to the second claim asserted by petitioner, I agree with JUSTICE SOUTER's analysis, and join Part III of his opinion. For these reasons, I would affirm the judgment of the Supreme Court of Arizona.

JUSTICE WHITE, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

Because I disagree with the result reached on each of the two separate issues before the Court, and because what I deem to be the proper result on either issue alone warrants reversal of petitioner's conviction, I respectfully dissent.

I

As *In re Winship*, 397 U. S. 358 (1970), makes clear, due process mandates "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *Id.*, at 364. In finding that the general jury verdict returned against petitioner meets the requirements of due process, the plurality ignores the import of *Winship*'s holding. In addition, the plurality mischaracterizes the nature of the constitutional problem in this case.

It is true that we generally give great deference to the States in defining the elements of crimes. I fail to see, however, how that truism advances the plurality's case. There is no failure to defer in recognizing the obvious: that premeditated murder and felony murder are alternative courses of conduct by which the crime of first-degree murder may be established. The statute provides:

> "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, de-

> liberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree." Ariz. Rev. Stat. Ann. § 13–452 (Supp. 1973).

The statute thus sets forth three general categories of conduct which constitute first-degree murder: a "wilful, deliberate or premeditated killing"; a killing committed to avoid arrest or effect escape; and a killing which occurs during the attempt or commission of various specified felonies.

Here, the prosecution set out to convict petitioner of first-degree murder by either of two different paths, premeditated murder and felony murder/robbery. Yet while these two paths both lead to a conviction for first-degree murder, they do so by divergent routes possessing no elements in common except the fact of a murder. In his closing argument to the jury, the prosecutor himself emphasized the difference between premeditated murder and felony murder:

> "There are two types of first degree murder, two ways for first degree murder to be committed. [One] is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice. And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.
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> . . . . .
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> "And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

> "The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components [sic] parts. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder." App. 6–7.

Unlike premeditated murder, felony murder does not require that the defendant commit the killing or even intend to kill, so long as the defendant is involved in the underlying felony. On the other hand, felony murder—but not premeditated murder—requires proof that the defendant had the requisite intent to commit and did commit the underlying felony. *State* v. *McLoughlin*, 139 Ariz. 481, 485, 679 P. 2d 504, 508 (1984). Premeditated murder, however, demands an intent to kill as well as premeditation, neither of which is required to prove felony murder. Thus, contrary to the plurality's assertion, see *ante*, at 639, the difference between the two paths is not merely one of a substitution of one *mens rea* for another. Rather, each contains separate elements of conduct and state of mind which cannot be mixed and matched at will.[1] It is particularly fanciful to equate

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[1] Changes to the Arizona first-degree murder statute since the date of the murder in question make it even clearer that felony murder and premeditated murder have different elements and involve different *mentes reae*. The statute now provides that the two offenses are alternative means of establishing first-degree murder. First, a person is guilty if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation." Ariz. Rev. Stat. Ann. § 13–1105.A(1) (1989). Second, a person is guilty if "[a]cting either alone or with one or more other persons such person commits or attempts to commit [any one of a series of specified felonies], and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person." § 13–1105.A(2). The antecedent of the current statute, which used substantially the same

an intent to do no more than rob with a premeditated intent to murder.

Consequently, a verdict that simply pronounces a defendant "guilty of first-degree murder" provides no clues as to whether the jury agrees that the three elements of premeditated murder or the two elements of felony murder have been proved beyond a reasonable doubt. Instead, it is entirely possible that half of the jury believed the defendant was guilty of premeditated murder and not guilty of felony murder/robbery, while half believed exactly the reverse. To put the matter another way, the plurality affirms this conviction without knowing that even a single element of either of the ways for proving first-degree murder, except the fact of a killing, has been found by a majority of the jury, let alone found unanimously by the jury as required by Arizona law. A defendant charged with first-degree murder is at least entitled to a verdict—something petitioner did not get in this case as long as the possibility exists that no more than six jurors voted for any one element of first-degree murder, except the fact of a killing.[2]

The means by which the plurality attempts to justify the result it reaches do not withstand scrutiny. In focusing on

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language, took effect on October 1, 1978, less then two months after the killing at issue occurred. 1977 Ariz. Sess. Laws, Ch. 142, § 60.

[2] Even the Arizona Supreme Court has acknowledged that the lack of information concerning juror agreement may call into question the validity of a general jury verdict when the prosecution proceeds under alternative theories. *State* v. *Smith*, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989). Indeed, petitioner's first trial exemplified this danger. There the State proceeded on *three* theories: premeditated murder, felony murder/robbery, and felony murder/kidnaping. The trial judge failed to instruct the jury on either of the underlying felonies, and the Arizona Supreme Court held this to be fundamental error. 142 Ariz. 619, 620, 691 P. 2d 710, 711 (1984). Petitioner's conviction was reversed because it was impossible to tell from the general jury verdict whether petitioner had been found guilty of premeditated murder or felony murder, for which the instructions had been deficient. *Id.*, at 621, 691 P. 2d, at 712. Cf. *Sandstrom* v. *Montana*, 442 U. S. 510, 526 (1979).

our vagueness cases, see *ante*, at 632–633, the plurality misses the point. The issue is not whether the statute here is so vague that an individual cannot reasonably know what conduct is criminalized. Indeed, the statute's specificity renders our vagueness cases inapplicable. The problem is that the Arizona statute, under a single heading, criminalizes several alternative patterns of conduct. While a State is free to construct a statute in this way, it violates due process for a State to invoke more than one statutory alternative, each with different specified elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt.

The plurality concedes that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Ante*, at 633. But this is very close to the effect of the jury verdict in this case. Allowing the jury to return a generic verdict following a prosecution on two separate theories with specified elements has the same effect as a jury verdict of "guilty of crime" based on alternative theories of embezzlement or reckless driving. Thus the statement that "[i]n Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder," *State* v. *Encinas*, 132 Ariz. 493, 496, 647 P. 2d 624, 627 (1982), neither recognizes nor resolves the issue in this case.

The plurality likewise misses the mark in attempting to compare this case to those in which the issue concerned proof of facts regarding the particular means by which a crime was committed. See *ante*, at 631–632. In the case of burglary, for example, the manner of entering is not an element of the crime; thus, *Winship* would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar.

It would, however, require the jury to find beyond a reasonable doubt that the defendant in fact broke and entered, because those are the "fact[s] necessary to constitute the crime." 397 U. S., at 364.[3]

Nor do our cases concerning the shifting of burdens and the creation of presumptions help the plurality's cause. See *ante*, at 638–639. Although this Court consistently has given deference to the State's definition of a crime, the Court also has made clear that having set forth the elements of a crime, a State is not free to remove the burden of proving one of those elements from the prosecution. For example, in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), the Court recognized that "under Montana law, whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide," and stressed that the State therefore could not shift the burden of proving lack of intent to the defendant. *Id.*, at 520–521. Conversely, in *Patterson* v. *New York*, 432 U. S. 197, 205–206 (1977), the Court found that it did not violate due process to require a defendant to establish the affirmative defense of extreme emotional disturbance, because "[t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." Here, the question is not whether the State "must be permitted a degree of flexibility" in defining the elements of the offense. See *ante*, at 638. Surely it is entitled to that deference. But having determined that premeditated murder and felony murder are separate paths to establishing first-degree murder, each containing a separate set of elements from the other, the State must

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[3] For similar reasons, the plurality's focus on the statutorily enumerated means of satisfying a given element of an offense, see *ante*, at 636, n. 6, is misplaced.

be held to its choice.[4] Cf. *Evitts* v. *Lucey*, 469 U. S. 387, 401 (1985). To allow the State to avoid the consequences of its legislative choices through judicial interpretation would permit the State to escape federal constitutional scrutiny even when its actions violate rudimentary due process.

The suggestion that the state of mind required for felony murder/robbery and that for premeditated murder may reasonably be considered equivalent, see *ante*, at 644, is not only unbelievable, but it also ignores the distinct consequences that may flow from a conviction for each offense at sentencing. Assuming that the requisite statutory aggravating circumstance exists, the death penalty may be imposed for premeditated murder, because a conviction necessarily carries with it a finding that the defendant intended to kill. See Ariz. Rev. Stat. Ann. § 13–703 (1989). This is not the case with felony murder, for a conviction only requires that the death occur during the felony; the defendant need not be proved to be the killer. Thus, this Court has required that in order for the death penalty to be imposed for felony murder, there must be a finding that the defendant in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used, *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), or that the defendant was a major participant in

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[4] Even if the crime of first-degree murder were generic, that different categories of the offense carry risks of different punishment is constitutionally significant. In *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), for example, this Court concluded that the absence of "heat of passion on sudden provocation," while not an expressly stated element of the offense of "homicide," was essential to reduce the punishment category of the crime from that of murder to manslaughter. *Id.*, at 697, 699. Consequently, the State there violated *In re Winship*, 397 U. S. 358 (1970), and principles of due process by requiring the defendant to establish the absence of the intent required for murder, and thereby rebut the presumption of malice. *Mullaney*, *supra*, at 703–704. As discussed below, the disparate intent requirements of premeditated murder and felony murder have life-or-death consequences at sentencing.

the felony and exhibited reckless indifference to human life, *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987).

In the instant case, the general verdict rendered by the jury contained no finding of intent or of actual killing by petitioner. The sentencing judge declared, however:

> "[T]he court does consider the fact that a felony murder instruction was given in mitigation, however there is not evidence to indicate that this murder was merely incidental to a robbery. The nature of the killing itself belies that. . . .
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> "The court finds beyond a reasonable doubt that the defendant attempted to kill Larry Grove, intended to kill Larry Grove and that defendant did kill Larry Grove.
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> "The victim was strangled to death by a ligature drawn very tightly about the neck and tied in a double knot. No other reasonable conclusion can be drawn from the proof in this case, notwithstanding the felony murder instruction." Tr. 8–9 (Aug. 29, 1985).

Regardless of what the jury actually had found in the guilt phase of the trial, the sentencing judge believed the murder was premeditated. Contrary to the plurality's suggestion, see *ante*, at 644–645, n. 9, the problem is not that a general verdict fails to provide the sentencing judge with sufficient information concerning whether to impose the death sentence. The issue is much more serious than that. If in fact the jury found that premeditation was lacking, but that petitioner had committed felony murder/robbery, then the sentencing judge's finding was in direct contravention of the jury verdict. It is clear, therefore, that the general jury verdict creates an intolerable risk that a sentencing judge may subsequently impose a death sentence based on findings that contradict those made by the jury during the guilt phase, but not revealed by their general verdict. Cf. *State* v. *Smith*, 160 Ariz. 507, 513, 774 P. 2d 811, 817 (1989).

II

I also cannot agree that the requirements of *Beck* v. *Alabama*, 447 U. S. 625 (1980), were satisfied by the instructions and verdict forms in this case. *Beck* held that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.*, at 637. The majority finds *Beck* satisfied because the jury here had the opportunity to convict petitioner of second-degree murder. See *ante*, at 646–648. But that alternative provided no "third option" to a choice between convicting petitioner of felony murder/robbery and acquitting him completely, because, as the State concedes, see Tr. of Oral Arg. 51–52, second-degree murder is a lesser included offense only of premeditated murder. Thus, the Arizona Supreme Court has declared that "'[t]he jury may not be instructed on a lesser degree of *murder* than first degree where, under the evidence, it was committed in the course of a robbery.'" *State* v. *Clayton*, 109 Ariz. 587, 595, 514 P. 2d 720, 728 (1973), quoting *State* v. *Kruchten*, 101 Ariz. 186, 196, 417 P. 2d 510, 520 (1966), cert. denied, 385 U. S. 1043 (1967) (emphasis added). Consequently, if the jury believed that the course of events led down the path of felony murder/robbery, rather than premeditated murder, it could not have convicted petitioner of second-degree murder as a legitimate "third option" to capital murder or acquittal.

The State asserts that felony murder has no lesser included offenses.[5] In order for a defendant to be convicted of fel-

[5] Arizona law has not been consistent on this point. Arizona cases have long said that "there is no lesser included *homicide* offense of the crime of felony murder since the *mens rea* necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony." *State* v. *Arias*, 131 Ariz. 441, 444, 641 P. 2d 1285, 1288

ony murder, however, there must be evidence to support a conviction on the underlying felony, and the jury must be instructed as to the elements of the underlying felony. Although the jury need not find that the underlying felony was completed, the felony murder statute requires there to be at least an attempt to commit the crime. As a result, the jury could not have convicted petitioner of felony murder/robbery without first finding him guilty of robbery or attempted robbery.[6] Indeed, petitioner's first conviction was reversed *because* the trial judge had failed to instruct the jury on the elements of robbery. 142 Ariz. 619, 691 P. 2d 710 (1984). As the Arizona Supreme Court declared: "Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence. Knowledge of the elements of the underlying felonies was vital for the jurors to properly consider a felony murder theory." *Id.*, at 620–621, 691 P. 2d, at 711–712 (citation omitted).

It is true that the rule in *Beck* only applies if there is in fact a lesser included offense to that with which the defendant is charged, for "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Spaziano* v. *Florida*, 468 U. S. 447, 455 (1984). But while deference is due state legislatures and courts in defining crimes, this deference has constitutional limits. In the case of a compound

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(1982) (emphasis added). Recent cases have omitted the crucial word "homicide." See, *e. g.*, *State* v. *LaGrand*, 153 Ariz. 21, 29–30, 734 P. 2d 563, 571–572, cert. denied, 484 U. S. 872–873 (1987).

[6] In this Court's recent decision in *Schmuck* v. *United States*, 489 U. S. 705 (1989), we adopted the "elements" test for defining "necessarily included" offenses for purposes of Federal Rule of Criminal Procedure 31(c). "Under this test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Schmuck*, *supra*, at 716. See also *Berra* v. *United States*, 351 U. S. 131, 134 (1956). Here that test is met, for petitioner could not be convicted of felony murder/robbery unless the jury found that a robbery, or an attempt to commit robbery, had occurred.

crime such as felony murder, in which one crime must be proved in order to prove the other, the underlying crime must, as a matter of law, be a lesser included offense of the greater.

Thus, in the instant case, robbery was a lesser included offense of the felony murder/robbery for which petitioner was tried. The Arizona Supreme Court acknowledged that "the evidence supported an instruction and conviction for robbery," had robbery been a lesser included offense of felony murder/robbery. 163 Ariz. 411, 417, 788 P. 2d 1162, 1168 (1989). Consequently, the evidence here met "the independent prerequisite for a lesser included offense instruction that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck* v. *United States*, 489 U. S. 705, 716, n. 8 (1989); see *Keeble* v. *United States*, 412 U. S. 205, 208 (1973). Due process required that the jury be given the opportunity to convict petitioner of robbery, a necessarily lesser included offense of felony murder/robbery. See *Stevenson* v. *United States*, 162 U. S. 313, 319–320 (1896).

Nor is it sufficient that a "third option" was given here for one of the prosecution's theories but not the other. When the State chooses to proceed on various theories, each of which has lesser included offenses, the relevant lesser included instructions and verdict forms on *each* theory must be given in order to satisfy *Beck*. Anything less renders *Beck*, and the due process it guarantees, meaningless.

With all due respect, I dissent.

Syllabus

COHEN *v.* COWLES MEDIA CO., DBA MINNEAPOLIS STAR & TRIBUNE CO., ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 90–634. Argued March 27, 1991—Decided June 24, 1991

During the 1982 Minnesota gubernatorial race, petitioner Cohen, who was associated with one party's campaign, gave court records concerning another party's candidate for Lieutenant Governor to respondent publishers' newspapers after receiving a promise of confidentiality from their reporters. Nonetheless, the papers identified him in their stories, and he was fired from his job. He filed suit against respondents in state court, alleging, among other things, a breach of contract. The court rejected respondents' argument that the First Amendment barred the suit, and a jury awarded him, *inter alia*, compensatory damages. The State Court of Appeals affirmed, but the State Supreme Court reversed, holding that a contract cause of action was inappropriate. It then went on to address the question whether Cohen could recover under state law on a promissory estoppel theory even though that issue was never tried to a jury, nor briefed nor argued by the parties, concluding that enforcement under such a theory would violate respondents' First Amendment rights.

Held:

1. This Court has jurisdiction. Respondents' contention that the case should be dismissed because the promissory estoppel theory was not argued or presented in the courts below and because the State Supreme Court's decision rests entirely on a state-law interpretation is rejected. It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided. *Orr* v. *Orr*, 440 U. S. 268, 274–275. Moreover, the Minnesota Supreme Court made clear that its holding rested on federal law, and respondents have defended against this suit all along by arguing that the First Amendment barred the enforcement of the reporters' promises. Pp. 667–668.

2. The First Amendment does not bar a promissory estoppel cause of action against respondents. Such a cause of action, although private, involves state action within the meaning of the Fourteenth Amendment and therefore triggers the First Amendment's protections, since promissory estoppel is a state-law doctrine creating legal obligations never explicitly assumed by the parties that are enforceable through the Minnesota courts' official power. Cf., *e. g.*, *New York Times Co.* v. *Sullivan*,

376 U. S. 254, 265. However, the doctrine is a law of general applicability that does not target or single out the press, but rather is applicable to all Minnesota citizens' daily transactions. Thus, the First Amendment does not require that its enforcement against the press be subject to stricter scrutiny than would be applied to enforcement against others, cf. *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133, even if the payment is characterized as compensatory damages. Nor does that Amendment grant the press protection from any law which in any fashion or to any degree limits or restricts its right to report truthful information. *Florida Star* v. *B. J. F.*, 491 U. S. 524, distinguished. Moreover, Cohen sought damages for a breach of promise that caused him to lose his job and lowered his earning capacity, and did not attempt to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, distinguished. Any resulting inhibition on truthful reporting is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law requiring it to keep certain promises. Pp. 668–672.

3. Cohen's request that his compensatory damages award be reinstated is rejected. The issues whether his verdict should be upheld on the ground that a promissory estoppel claim had been established under state law and whether the State Constitution may be construed to shield the press from an action such as this one are matters for the State Supreme Court to address and resolve in the first instance. P. 672.

457 N. W. 2d 199, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and SOUTER, JJ., joined, *post*, p. 672. SOUTER, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, *post*, p. 676.

Elliot C. Rothenberg argued the cause and filed briefs for petitioner.

John D. French argued the cause for respondents. With him on the brief for respondent Cowles Media Co. were *John Borger* and *Randy M. Lebedoff*. *Stephen M. Shapiro, Andrew L. Frey, Kenneth S. Geller, Mark I. Levy, Michael W. McConnell, Paul R. Hannah, Laurie A. Zenner, John C.*

Fontaine, and *Cristina L. Mendoza* filed a brief for respondent Northwest Publications, Inc.*

JUSTICE WHITE delivered the opinion of the Court.

The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information. We hold that it does not.

During the closing days of the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached reporters from the St. Paul Pioneer Press Dispatch (Pioneer Press) and the Minneapolis Star and Tribune (Star Tribune) and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The first record indicated that Johnson had been charged in 1969 with three counts of unlawful assembly, and the second that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her explanation and one reporter tracked down the person who had found the records for Cohen. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying

**Rex S. Heinke, Robert S. Warren, Jerry S. Birenz, Ralph P. Huber, W. Terry Maguire, Rene P. Milam, Richard M. Schmidt, Harold W. Fuson, Jr., Barbara Wartelle Wall, James E. Grossberg, George Freeman*, and *William A. Niese* filed a brief for Advance Publications, Inc., et al. as *amici curiae*.

for $6 worth of sewing materials. The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

After consultation and debate, the editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories concerning Johnson. In their stories, both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued respondents, the publishers of the Pioneer Press and Star Tribune, in Minnesota state court, alleging fraudulent misrepresentation and breach of contract. The trial court rejected respondents' argument that the First Amendment barred Cohen's lawsuit. A jury returned a verdict in Cohen's favor, awarding him $200,000 in compensatory damages and $500,000 in punitive damages. The Minnesota Court of Appeals, in a split decision, reversed the award of punitive damages after concluding that Cohen had failed to establish a fraud claim, the only claim which would support such an award. 445 N. W. 2d 248, 260 (1989). However, the court upheld the finding of liability for breach of contract and the $200,000 compensatory damages award. *Id.*, at 262.

A divided Minnesota Supreme Court reversed the compensatory damages award. 457 N. W. 2d 199 (1990). After affirming the Court of Appeals' determination that Cohen had not established a claim for fraudulent misrepresentation, the court considered his breach-of-contract claim and concluded that "a contract cause of action is inappropriate for these particular circumstances." *Id.*, at 203. The court then went on to address the question whether Cohen could establish a cause of action under Minnesota law on a promissory estoppel theory. Apparently, a promissory estoppel theory was never tried to the jury, nor briefed nor argued by

the parties; it first arose during oral argument in the Minnesota Supreme Court when one of the justices asked a question about equitable estoppel. See App. 38.

In addressing the promissory estoppel question, the court decided that the most problematic element in establishing such a cause of action here was whether injustice could be avoided only by enforcing the promise of confidentiality made to Cohen. The court stated: "Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." 457 N. W. 2d, at 205. After a brief discussion, the court concluded that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." *Ibid.*

We granted certiorari to consider the First Amendment implications of this case. 498 U. S. 1011 (1990).

Respondents initially contend that the Court should dismiss this case without reaching the merits because the promissory estoppel theory was not argued or presented in the courts below and because the Minnesota Supreme Court's decision rests entirely on the interpretation of state law. These contentions do not merit extended discussion. It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided. *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 754, n. 2 (1985); *Mills* v. *Maryland*, 486 U. S. 367, 371, n. 3 (1988); *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978); *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974). Moreover, that the Minnesota Supreme Court rested its holding on federal law could not be made

more clear than by its conclusion that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." 457 N. W. 2d, at 205. It can hardly be said that there is no First Amendment issue present in the case when respondents have defended against this suit all along by arguing that the First Amendment barred the enforcement of the reporters' promises to Cohen. We proceed to consider whether that Amendment bars a promissory estoppel cause of action against respondents.

The initial question we face is whether a private cause of action for promissory estoppel involves "state action" within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. For if it does not, then the First Amendment has no bearing on this case. The rationale of our decision in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and subsequent cases compels the conclusion that there is state action here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. See, *e. g.*, *id.*, at 265; *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 916, n. 51 (1982); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 777 (1986). In this case, the Minnesota Supreme Court held that if Cohen could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties. These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute "state action" for purposes of the Fourteenth Amendment.

Respondents rely on the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a

state interest of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 103 (1979). That proposition is unexceptionable, and it has been applied in various cases that have found insufficient the asserted state interests in preventing publication of truthful, lawfully obtained information. See, *e. g.*, *Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989); *Smith* v. *Daily Mail*, *supra*; *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978).

This case, however, is not controlled by this line of cases but, rather, by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 576–579 (1977). Similarly, the media must obey the National Labor Relations Act, *Associated Press* v. *NLRB*, 301 U. S. 103 (1937), and the Fair Labor Standards Act, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946); may not restrain trade in violation of the antitrust laws, *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969); and must pay nondiscriminatory taxes, *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112 (1943); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 581–583 (1983).

Cf. *University of Pennsylvania* v. *EEOC*, 493 U. S. 182, 201–202 (1990). It is, therefore, beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *NLRB*, *supra*, at 132–133. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

JUSTICE BLACKMUN suggests that applying Minnesota promissory estoppel doctrine in this case will "punish" respondents for publishing truthful information that was lawfully obtained. *Post*, at 675–676. This is not strictly accurate because compensatory damages are not a form of punishment, as were the criminal sanctions at issue in *Smith* v. *Daily Mail*, *supra*. If the contract between the parties in this case had contained a liquidated damages provision, it would be perfectly clear that the payment to petitioner would represent a cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State. The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source. In any event, as indicated above, the characterization of the payment makes no difference for First Amendment purposes when the law being applied is a general law and does not single out the press. Moreover, JUSTICE BLACKMUN's reliance on cases like *Florida Star* v. *B. J. F.*, *supra*, and *Smith* v. *Daily Mail* is misplaced. In those cases, the State itself defined the content of publications that would trigger liability. Here, by con-

trast, Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.

Also, it is not at all clear that respondents obtained Cohen's name "lawfully" in this case, at least for purposes of publishing it. Unlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise that they did not honor. The dissenting opinions suggest that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press' right to report truthful information. The First Amendment does not grant the press such limitless protection.

Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. As the Minnesota Supreme Court observed here, "Cohen could not sue for defamation because the information disclosed [his name] was true." 457 N. W. 2d, at 202. Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

Respondents and *amici* argue that permitting Cohen to maintain a cause of action for promissory estoppel will inhibit truthful reporting because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy. JUSTICE SOUTER makes a similar argument. But if this is the case,

it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them. Although we conclude that the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law, we reject Cohen's request that in reversing the Minnesota Supreme Court's judgment we reinstate the jury verdict awarding him $200,000 in compensatory damages. See Brief for Petitioner 31. The Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law and whether Cohen's jury verdict could be upheld on a promissory estoppel basis. Or perhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action such as this one. These are matters for the Minnesota Supreme Court to address and resolve in the first instance on remand. Accordingly, the judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE SOUTER join, dissenting.

I agree with the Court that the decision of the Supreme Court of Minnesota rested on federal grounds and that the judicial enforcement of petitioner's promissory estoppel claim constitutes state action under the Fourteenth Amendment. I do not agree, however, that the use of that claim to penalize the reporting of truthful information regarding a political campaign does not violate the First Amendment. Accordingly, I dissent.

The majority concludes that this case is not controlled by the decision in *Smith* v. *Daily Mail Publishing Co.*, 443

U. S. 97 (1979), to the effect that a State may not punish the publication of lawfully obtained, truthful information "absent a need to further a state interest of the highest order." *Id.*, at 103. Instead, we are told, the controlling precedent is "the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Ante*, at 669. See, *e. g.*, *Branzburg* v. *Hayes*, 408 U. S. 665 (1972); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193 (1946); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 581–583 (1983). I disagree.

I do not read the decision of the Supreme Court of Minnesota to create any exception to, or immunity from, the laws of that State for members of the press. In my view, the court's decision is premised, not on the identity of the speaker, but on the speech itself. Thus, the court found it to be of "critical significance," that "the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." 457 N. W. 2d 199, 205 (1990); see also *id.*, at 204, n. 6 ("*New York Times* v. *Sullivan*, 376 U. S. 254 . . . (1964), holds that a state may not adopt a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press"). Necessarily, the First Amendment protection afforded respondents would be equally available to nonmedia defendants. See, *e. g.*, *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion"). The majority's admonition that "'[t]he publisher of a newspaper has no special immunity from the application of general laws,'" *ante*, at 670, and its

reliance on the cases that support that principle, are therefore misplaced.

In *Branzburg*, for example, this Court found it significant that "these cases involve no intrusions upon speech or assembly, no . . . restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. . . . [N]o penalty, civil or criminal, related to the content of published material is at issue here." 408 U. S., at 681. Indeed, "[t]he sole issue before us" in *Branzburg* was "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." *Id.*, at 682. See also *Associated Press* v. *NLRB*, 301 U. S. 103, 133 (1937); *Associated Press* v. *United States*, 326 U. S. 1, 20, n. 18 (1945); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969). In short, these cases did *not* involve the imposition of liability based upon the content of speech.[1]

Contrary to the majority, I regard our decision in *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988), to be precisely on point. There, we found that the use of a claim of intentional infliction of emotional distress to impose liability for the publication of a satirical critique violated the First

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[1] The only arguable exception is *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977). In *Zacchini*, a performer sued a news organization for appropriation of his "right to the publicity value of his performance," *id.*, at 565, after it broadcast the entirety of his act on local television. This Court held that the First Amendment did not bar the suit. We made clear, however, that our holding did not extend to the reporting of *information* about an event of public interest. We explained: "If . . . respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case." *Id.*, at 569. Thus, *Zacchini* cannot support the majority's conclusion that "a law of general applicability," *ante*, at 670, may not violate the First Amendment when employed to penalize the dissemination of truthful information or the expression of opinion.

Amendment. There was no doubt that Virginia's tort of intentional infliction of emotional distress was "a law of general applicability" unrelated to the suppression of speech.[2] Nonetheless, a unanimous Court found that, when used to penalize the expression of opinion, the law was subject to the strictures of the First Amendment. In applying that principle, we concluded, *id.*, at 56, that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,'" as defined by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). In so doing, we rejected the argument that Virginia's interest in protecting its citizens from emotional distress was sufficient to remove from First Amendment protection a "patently offensive" expression of opinion. 485 U. S., at 50.[3]

As in *Hustler*, the operation of Minnesota's doctrine of promissory estoppel in this case cannot be said to have a merely "incidental" burden on speech; the publication of important political speech *is* the claimed violation. Thus, as in *Hustler*, the law may not be enforced to punish the expres-

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[2] The Virginia cause of action for intentional infliction of emotional distress at issue in *Hustler* provided for recovery where a plaintiff could demonstrate "that the defendant's conduct (1) is intentional or reckless; (2) offends generally accepted standards of decency or morality; (3) is causally connected with the plaintiff's emotional distress; and (4) caused emotional distress that was severe." 485 U. S., at 50, n. 3.

[3] The majority attempts to distinguish *Hustler* on the ground that there the plaintiff sought damages for injury to his state of mind whereas the petitioner here sought damages "for a breach of a promise that caused him to lose his job and lowered his earning capacity." *Ante*, at 671. I perceive no meaningful distinction between a statute that penalizes published speech in order to protect the individual's psychological well being or reputational interest and one that exacts the same penalty in order to compensate the loss of employment or earning potential. Certainly, our decision in *Hustler* recognized no such distinction.

sion of truthful information or opinion.[4] In the instant case, it is undisputed that the publication at issue was true.

To the extent that truthful speech may ever be sanctioned consistent with the First Amendment, it must be in furtherance of a state interest "of the highest order." *Smith*, 443 U. S., at 103. Because the Minnesota Supreme Court's opinion makes clear that the State's interest in enforcing its promissory estoppel doctrine in this case was far from compelling, see 457 N. W. 2d, at 204–205, I would affirm that court's decision.

I respectfully dissent.

JUSTICE SOUTER, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

I agree with JUSTICE BLACKMUN that this case does not fall within the line of authority holding the press to laws of general applicability where commercial activities and rela-

[4] The majority argues that, unlike the criminal sanctions we considered in *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979), the liability at issue here will not "punish" respondents in the strict sense of that word. *Ante*, at 670. While this may be true, we have long held that the imposition of civil liability based on protected expression constitutes "punishment" of speech for First Amendment purposes. See, *e. g.*, *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 386 (1973) ("In the context of a libelous advertisement . . . this Court has held that the First Amendment does not shield a newspaper from *punishment* for libel when with actual malice it publishes a falsely defamatory advertisement") (emphasis added), citing *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974) ("*[P]unishment* of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press") (emphasis added). Cf. *New York Times Co.*, 376 U. S., at 297 (Black, J., concurring) ("To *punish* the exercise of this right to discuss public affairs or to *penalize* it through libel judgments is to abridge or shut off discussion of the very kind most needed") (emphasis added).

Though they be civil, the sanctions we review in this case are no more justifiable as "a cost of acquiring newsworthy material," *ante*, at 670, than were the libel damages at issue in *New York Times Co.*, a permissible cost of disseminating newsworthy material.

tionships, not the content of publication, are at issue. See *ante*, at 674. Even such general laws as do entail effects on the content of speech, like the one in question, may of course be found constitutional, but only, as Justice Harlan observed,

> "when [such effects] have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved." *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 51 (1961).

Thus, "[t]here is nothing talismanic about neutral laws of general applicability," *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 901 (1990) (O'CONNOR, J., concurring in judgment), for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself. Because I do not believe the fact of general applicability to be dispositive, I find it necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests, and such has been the Court's recent practice in publication cases. See *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977).

Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense "self-imposed" by the newspaper's voluntary promise of confidentiality. See *ante*, at 671. This suggests both the possibility of waiver, the requirements for which have not been met here, see, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967), as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the

information to public discourse. But freedom of the press is ultimately founded on the value of enhancing such discourse for the sake of a citizenry better informed and thus more prudently self-governed. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). In this context, "'[i]t is the right of the [public], not the right of the [media], which is paramount,'" *CBS, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981) (emphasis omitted) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969)), for "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally," *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975); cf. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 573 (1980); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 278–279 (1964).

The importance of this public interest is integral to the balance that should be struck in this case. There can be no doubt that the fact of Cohen's identity expanded the universe of information relevant to the choice faced by Minnesota voters in that State's 1982 gubernatorial election, the publication of which was thus of the sort quintessentially subject to strict First Amendment protection. See, *e. g.*, *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214, 223 (1989). The propriety of his leak to respondents could be taken to reflect on his character, which in turn could be taken to reflect on the character of the candidate who had retained him as an adviser. An election could turn on just such a factor; if it should, I am ready to assume that it would be to the greater public good, at least over the long run.

This is not to say that the breach of such a promise of confidentiality could never give rise to liability. One can conceive of situations in which the injured party is a private indi-

vidual, whose identity is of less public concern than that of petitioner; liability there might not be constitutionally prohibited. Nor do I mean to imply that the circumstances of acquisition are irrelevant to the balance, see, *e. g.*, *Florida Star* v. *B. J. F.*, 491 U. S. 524, 534–535, and n. 8 (1989), although they may go only to what balances against, and not to diminish, the First Amendment value of any particular piece of information.

Because I believe the State's interest in enforcing a newspaper's promise of confidentiality insufficient to outweigh the interest in unfettered publication of the information revealed in this case, I respectfully dissent.

PAULEY, SURVIVOR OF PAULEY *v.* BETHENERGY MINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89–1714. Argued February 20, 1991—Decided June 24, 1991*

Congress created the black lung benefits program to provide compensation for disability to miners due, at least in part, to pneumoconiosis arising out of coal mine employment. The program was first administered by the Social Security Administration (SSA) under the auspices of the then-existent Department of Health, Education, and Welfare (HEW), and later by the Department of Labor (DOL). Congress authorized these Departments, during their respective tenures, to adopt interim regulations governing claims adjudications, but constrained the Secretary of Labor by providing that the DOL regulations "shall not be more restrictive than" HEW's. As here relevant, the HEW interim regulations permit the invocation of a rebuttable statutory presumption of eligibility for benefits upon introduction by the claimant of specified medical evidence, 20 CFR § 410.490(b)(1), and a demonstration that the "impairment [thus] established . . . arose out of coal mine employment (see §§ 410.416 and 410.456)," § 410.490(b)(2). The referred-to sections presume, "in the absence of persuasive evidence to the contrary," that pneumoconiosis arose out of such employment. Once a claimant invokes the eligibility presumption, § 410.490(c) permits the SSA to rebut the presumption by two methods. In contrast, the comparable DOL interim regulations set forth four rebuttal provisions. The first two provisions mimic those in the HEW regulations. The third provision permits rebuttal upon a showing that the miner's disability did not arise in whole or in part out of coal mine employment, and the fourth authorizes rebuttal with evidence demonstrating that the miner does not have pneumoconiosis. In No. 89–1714, the Court of Appeals concluded that the DOL regulations were not "more restrictive than" the HEW regulations by virtue of the DOL's third rebuttal provision, and therefore reversed an administrative award of benefits to a claimant found to qualify under the HEW

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*Together with No. 90–113, *Clinchfield Coal Co.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.*, and No. 90–114, *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.*, on certiorari to the United States Court of Appeals for the Fourth Circuit.

regulations, but not under the DOL provisions. In Nos. 90–113 and 90–114, the Court of Appeals struck down the DOL regulations as being "more restrictive than" HEW's, reversing DOL's denial of benefits to two claimants whose eligibility was deemed rebutted under the fourth rebuttal provision.

Held: The third and fourth rebuttal provisions in the DOL regulations do not render those regulations "more restrictive than" the HEW regulations. Pp. 695–706.

(a) The Secretary of Labor's determination that her interim regulations are not more restrictive than HEW's warrants deference from this Court. Deference to an agency's interpretation of ambiguous provisions in the statutes it is authorized to implement is appropriate when Congress has delegated policymaking authority to the agency. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 866. Here, since the relevant legislation has produced a complex and highly technical regulatory program, requiring significant expertise in the identification and classification of medical eligibility criteria, and entailing the exercise of judgment grounded in policy concerns, Congress must have intended, with respect to the "not . . . more restrictive than" phrase, a delegation of broad policymaking discretion to the Secretary of Labor. This is evident from the statutory text in that Congress declined to require that the DOL adopt the HEW interim regulations verbatim, and from the statute's legislative history, which demonstrates that the delegation was made with the intention that the black lung program evolve as technological expertise matured. Thus, the Secretary's authority necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof. Pp. 696–699.

(b) The Secretary of Labor's position satisfies *Chevron*'s reasonableness requirement. See 467 U. S., at 845. Based on the premise that the HEW regulations were adopted to ensure that only miners who were disabled due to pneumoconiosis arising out of coal mine employment would receive benefits, the Secretary interprets HEW's § 410.490(b)(2) requirement that the claimant demonstrate that the impairment "arose out of coal mine employment" as comparable to DOL's third rebuttal provision, and views subsection (b)(2)'s incorporation by reference of §§ 410.416 and 410.456 as doing the work of DOL's fourth rebuttal method, in light of the statutory definition of pneumoconiosis as "a . . . disease . . . arising out of coal mine employment." This interpretation harmonizes the two interim regulations with the statute. Moreover, the Secretary's interpretation is more reasoned than that of the claimants, who assert that the HEW regulations contain no provision, either in the invocation subsection or in the rebuttal subsection, that directs factual

inquiry into the issue of disability causation or the existence of pneumoconiosis. The claimants' contention that § 410.490(b)(1) creates a "conclusive" presumption of entitlement without regard to the existence of competent evidence on these questions is deficient in two respects. First, the claimants' premise is inconsistent with the statutory text, which expressly provides that the presumptions in question will be rebuttable, and requires the Secretary of HEW to consider all relevant evidence. Second, although subsection (c)'s delineation of two rebuttal methods may support an inference that the drafter intended to exclude other methods, such an inference provides no guidance where its application would render a regulation inconsistent with the statute's purpose and language. The fact that the SSA, under the HEW regulations, appeared to award benefits to miners whose administrative files contained scant evidence of eligibility does not require the Secretary to forgo inquiries into disability causation and disease existence. The claimants' argument that HEW omitted such inquiries from its criteria based on a "cost/benefit" conclusion that the inquiries would engender inordinate delays yet generate little probative evidence finds scant support in contemporaneous analyses of the SSA awards; disregards entirely subsequent advances in medical technology that Congress could not have intended the HEW or the DOL to ignore; and is based on the unacceptable premise that the Secretary must demonstrate that her reasonable interpretation of HEW's regulations is consistent with HEW's contemporaneous interpretation of those regulations. Pp. 699–706.

No. 89–1714, 890 F. 2d 1295, affirmed; No. 90–113, 895 F. 2d 178, and No. 90–114, 895 F. 2d 173, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 706. KENNEDY, J., took no part in the consideration or decision of the litigation.

Mark E. Solomons argued the cause for respondents in No. 89–1714 and petitioners in Nos. 90–113 and 90–114. With him on the briefs for petitioners in Nos. 90–113 and 90–114 were *Laura Metcoff Klaus*, *Allen R. Prunty*, and *John J. Bagnato*. *Messrs. Bagnato* and *Solomons*, *Ms. Klaus*, *Curtis H. Barnette*, and *Mr. Prunty* filed a brief for respondent BethEnergy Mines, Inc.

Christopher J. Wright argued the cause for the federal respondent in all cases. With him on the briefs were *Solicitor*

General Starr, Deputy Solicitor General Shapiro, Allen H. Feldman, and *Edward D. Sieger.*

Julian N. Henriques, Jr., argued the cause for petitioner in No. 89–1714 and private respondents in Nos. 90–113 and 90–114. With him on the briefs for petitioner in 89–1714 were *Robert E. Lehrer, Timothy P. Creany,* and *Blair V. Pawlowski. Sherry Lee Wilson* filed a brief for respondent Taylor in No. 90–113. *Thomas R. Michael* filed a brief for respondent Dayton in No. 90–114.†

JUSTICE BLACKMUN delivered the opinion of the Court.

The black lung benefits program, created by Congress, was to be administered first by the Social Security Administration (SSA) under the auspices of the then-existent Department of Health, Education, and Welfare (HEW), and later by the Department of Labor (DOL). Congress authorized these Departments, during their respective tenures, to adopt interim regulations governing the adjudication of claims for black lung benefits, but constrained the Secretary of Labor by providing that the DOL regulations "shall not be more restrictive than" HEW's. This litigation calls upon us to determine whether the Secretary of Labor has complied with that constraint.

I

A

The black lung benefits program was enacted originally as Title IV of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA), 83 Stat. 792, 30 U. S. C. §901 *et seq.*, to provide benefits for miners totally disabled due at least in

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†*Robert H. Stropp, Jr.,* and *Michael Dinnerstein* filed a brief for the United Mine Workers of America as *amicus curiae* urging reversal in No. 89–1714.

Briefs of *amici curiae* urging reversal in Nos. 90–113 and 90–114 and affirmance in 89–1714 were filed for the National Coal Association by *William E. Hynan;* and for the National Council on Compensation Insurance by *Michael Camilleri.*

part to pneumoconiosis arising out of coal mine employment, and to the dependents and survivors of such miners. See *Pittston Coal Group* v. *Sebben*, 488 U. S. 105, 108 (1988); *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor*, 484 U. S. 135, 138 (1987).

Through FCMHSA, Congress established a bifurcated system of compensating miners disabled by pneumoconiosis.[1] Part B thereof created a temporary program administered by the SSA under the auspices of the Secretary of HEW. This program was intended for the processing of claims filed on or before December 31, 1972. Benefits awarded under part B were paid by the Federal Government. For claims filed after 1972, part C originally authorized a permanent program, administered by the Secretary of Labor, to be coordinated with federally approved state workers' compensation programs. Benefits awarded under part C were to be paid by the claimants' coal mining employers.

Under FCMHSA, the Secretary of HEW was authorized to promulgate permanent regulations regarding the determination and adjudication of part B claims. 30 U. S. C. § 921(b). The Secretary's discretion was limited, however, by three statutory presumptions defining eligibility under the part B program. § 921(c). For a claimant suffering from pneumoconiosis who could establish 10 years of coal mine employment, there "shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." § 921(c)(1). Similarly, for a miner with at least 10 years of

[1] Pneumoconiosis was identified by the Surgeon General as "a chronic chest disease caused by the accumulation of fine coal dust particles in the human lung." S. Rep. No. 95–209, p. 5 (1977). What he described as simple pneumoconiosis seldom produces significant ventilation impairment, but it may reduce the ability of the lung to transfer oxygen to the blood. Complicated pneumoconiosis is a more serious disease, for the patient "incurs progressive massive fibrosis as a complex reaction to dust and other factors." In its complicated stage, pneumoconiosis "usually produces marked pulmonary impairment and considerable respiratory disability." *Ibid.*

coal mine employment who "died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis." § 921(c)(2). Finally, there was an irrebuttable presumption that a miner presenting medical evidence demonstrating complicated pneumoconiosis was totally disabled as a result of that condition. § 921(c)(3). Consistent with these presumptions, HEW promulgated permanent regulations prescribing the methods and standards for establishing entitlement to black lung benefits under part B. See 20 CFR §§ 410.401 to 410.476 (1990).

B

Dissatisfied with the increasing backlog of unadjudicated claims and the relatively high rate of claim denials resulting from the application of the HEW permanent regulations, Congress in 1972 amended FCMHSA and redesignated Title IV of that Act as the Black Lung Benefits Act of 1972 (Benefits Act). 86 Stat. 150. See S. Rep. No. 92–743 (1972). See also Comptroller General of the United States, General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs in Paying Black Lung Benefits to Coal Miners and Their Widows 16–18 (September 5, 1972) (nationally, as of December 31, 1971, claims filed were 347,716, claims processed were 322,582, and rate of claim denial was 50.5 percent). In addition to extending the coverage of part B to those claims filed by living miners prior to July 1, 1973, and those filed by survivors before January 1, 1974, the 1972 amendments liberalized in several ways the criteria and procedures applicable to part B claims. First, the amendments added a fourth statutory presumption of total disability due to pneumoconiosis for claimants unable to produce X-ray evidence of the disease. This presumption applied to a claimant with 15 years of coal mine employment who presented evidence of a totally disabling respiratory or pulmonary impairment. Congress expressly limited rebuttal of the presumption to a showing that the miner did not

have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of employment in a coal mine. 30 U. S. C. § 921(c)(4). Second, the 1972 amendments redefined "total disability" to permit an award of benefits on a showing that a miner was unable to perform his coal mining duties or other comparable work—as opposed to the prior requirement that the miner demonstrate that he was unable to perform any job, see § 902(f)—and prohibited HEW from denying a claim for benefits solely on the basis of a negative X ray. § 923(b). Third, the 1972 amendments made it easier for survivors of a deceased miner who had been disabled due to pneumoconiosis but had died from a cause unrelated to the disease to demonstrate eligibility for benefits. See § 901. Finally, the amendments made clear that "[i]n determining the validity of claims under [part B], all relevant evidence shall be considered." § 923(b).

In response to these amendments, the Secretary of HEW adopted interim regulations "designed to 'permit prompt and vigorous processing of the large backlog of claims' that had developed during the early phases of administering part B." *Sebben*, 488 U. S., at 109, quoting 20 CFR § 410.490(a) (1973).[2] These interim regulations established adjudicatory rules for processing part B claims that permit the invocation of a presumption of eligibility upon demonstration by the claimant of specified factors, and a subsequent opportunity for the SSA, in administering the program, to rebut the presumption.

Specifically, the HEW interim regulations permit claimants to invoke a rebuttable presumption that a miner is "to-

[2] Although the 1972 amendments did not direct the Secretary of HEW to promulgate these new interim regulations, the Report of the Senate Committee on Labor and Public Welfare contained a strongly worded invitation to do so. See S. Rep. No. 92–743, p. 18 (1972) ("Accordingly, the Committee expects the Secretary to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments").

tally disabled due to pneumoconiosis" in one of two ways. First, the claimant can introduce an X ray, a biopsy, or an autopsy indicating pneumoconiosis. 20 CFR § 410.490(b)(1)(i) (1990). Second, for a miner with at least 15 years of coal mine employment, a claimant may introduce ventilatory studies establishing the presence of a chronic respiratory or pulmonary disease. § 410.490(b)(1)(ii). In either case, in order to invoke the presumption, the claimant also must demonstrate that the "impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456)." § 410.490(b)(2).

Once a claimant invokes the presumption of eligibility under § 410.490(b), the HEW interim regulations permit rebuttal by the SSA upon a showing that the miner is doing his usual coal mine work or comparable and gainful work, or is capable of doing such work. See § 410.490(c).

The statutory changes adopted by the 1972 amendments and the application of HEW's interim regulations resulted in a surge of claims approvals under part B. See Lopatto, The Federal Black Lung Program: A 1983 Primer, 85 W. Va. L. Rev. 677, 686 (1983) (demonstrating that the overall approval rate for part B claims had substantially increased by December 31, 1974). Because the HEW interim regulations expired with the part B program, however, the Secretary of Labor was constrained to adjudicate all part C claims, *i. e.*, those filed after June 30, 1973, by living miners, and after December 31, 1973, by survivors, under the more stringent permanent HEW regulations. See *Sebben*, 488 U. S., at 110. Neither the Congress nor the Secretary of Labor was content with the application to part C claims of the unwieldy and restrictive permanent regulations. See Letter, dated Sept. 13, 1974, of William J. Kilberg, Solicitor of Labor, to John B. Rhinelander, General Counsel, Department of HEW, appearing in H. R. Rep. No. 94–770, p. 14 (1975). Not only did the application of the permanent regulations cause the DOL to process claims slowly, but the DOL's

claims approval rate was significantly below that of the SSA. See Lopatto, *supra*, at 691. Accordingly, Congress turned its attention once again to the black lung benefits program.

C

The Black Lung Benefits Reform Act of 1977 (BLBRA), 92 Stat. 95, approved and effective March 1, 1978, further liberalized the criteria for eligibility for black lung benefits in several ways. First, the Act expanded the definition of pneumoconiosis to include "sequelae" of the disease, including respiratory and pulmonary impairments arising out of coal mine employment. See 30 U. S. C. § 902(b). Second, BLBRA required the DOL to accept a board-certified or board-eligible radiologist's interpretation of submitted X rays if the films met minimal quality standards, thereby prohibiting the DOL from denying a claim based on a secondary assessment of the X rays provided by a Government-funded radiologist. See § 923(b). Finally, the BLBRA added a fifth presumption of eligibility and otherwise altered the entitlement structure to make it easier for survivors of a deceased long-term miner to obtain benefits. See §§ 921(c)(5) and 902(f).

In addition to liberalizing the statutory prerequisites to benefit entitlement, the BLBRA authorized the DOL to adopt its own interim regulations for processing part C claims filed before March 31, 1980. In so doing, Congress required that the "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." § 902(f)(2).

The Secretary of Labor, pursuant to this authorization, adopted interim regulations governing the adjudication of part C claims. These regulations differ significantly from the HEW interim regulations. See 20 CFR § 727.203 (1990). The DOL regulations include two presumption provisions similar to the two presumption provisions in the HEW interim regulations. Compare §§ 727.203(a)(1) and (2) with §§ 410.490(b)(1)(i) and (ii). To invoke the presumption of eli-

gibility under these two provisions, however, a claimant need not prove that the "impairment . . . arose out of coal mine employment," as was required under the HEW interim regulations. See § 410.490(b)(2).

In addition, the DOL interim regulations add three methods of invoking the presumption of eligibility not included in the HEW interim regulations. Specifically, under the DOL regulations, a claimant can invoke the presumption of total disability due to pneumoconiosis by submitting blood gas studies that demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood; by submitting other medical evidence establishing the presence of a totally disabling respiratory or pulmonary impairment; or, in the case of a deceased miner for whom no medical evidence is available, by submitting a survivor's affidavit demonstrating such a disability. See §§ 727.203(a)(3), (4), and (5).

Finally, the DOL interim regulations provide four methods for rebutting the presumptions established under § 727.203. Two of the rebuttal provisions mimic those in the HEW regulations, permitting rebuttal upon a showing that the miner is performing, or is able to perform, his coal mining or comparable work. See §§ 727.203(b)(1) and (2). The other two rebuttal provisions are at issue in these cases. Under these provisions, a presumption of total disability due to pneumoconiosis can be rebutted if "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment," or if "[t]he evidence establishes that the miner does not, or did not, have pneumoconiosis." See §§ 727.203(b)(3) and (4).

II

The three cases before us present the question whether the DOL's interim regulations are "more restrictive than" HEW's interim regulations by virtue of the third and fourth rebuttal provisions, and therefore are inconsistent with the agency's

statutory authority. In No. 89–1714, *Pauley* v. *BethEnergy Mines, Inc.*, the Court of Appeals for the Third Circuit concluded that the DOL interim regulations were not more restrictive. *BethEnergy Mines, Inc.* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor*, 890 F. 2d 1295 (1989). John Pauley, the now-deceased husband of petitioner Harriet Pauley, filed a claim for black lung benefits on April 21, 1978, after he had worked 30 years in the underground mines of Pennsylvania. Pauley stopped working soon after he filed his claim for benefits. At a formal hearing on November 5, 1987, the Administrative Law Judge (ALJ) found that Pauley had begun to experience shortness of breath, coughing, and fatigue in 1974, and that those symptoms had gradually worsened, causing him to leave his job in the mines. The ALJ also found that Pauley had arthritis requiring several medications daily, had suffered a stroke in January 1987, and had smoked cigarettes for 34 years until he stopped in 1974.

Because respondent BethEnergy did not contest the presence of coal workers' pneumoconiosis, the ALJ found that the presumption had been invoked under § 727.203(a)(1). Turning to the rebuttal evidence, the ALJ concluded that Pauley was not engaged in his usual coal mine work or comparable and gainful work, and that Pauley was totally disabled from returning to coal mining or comparable employment. See §§ 727.203(b)(1) and (2). The ALJ then weighed the evidence submitted under § 727.203(b)(3), and determined that respondent BethEnergy had sustained its burden of establishing that pneumoconiosis was not a contributing factor in Pauley's total disability and, accordingly, that his disability did not "arise in whole or in part out of coal mine employment." § 727.203(b)(3). See *Carozza* v. *United States Steel Corp.*, 727 F. 2d 74 (CA3 1984).

Having determined that Pauley was not entitled to receive black lung benefits under the DOL interim regulations, the ALJ felt constrained by Third Circuit precedent to apply the

HEW interim regulations to Pauley's claim. He first concluded that respondent BethEnergy's concession that Pauley had pneumoconiosis arising out of coal mining employment was sufficient to invoke the presumption of total disability due to pneumoconiosis under § 410.490(b). Because the evidence demonstrated Pauley's inability to work, and the ALJ interpreted § 410.490(c) as precluding rebuttal of the presumption by "showing that the claimant's total disability is unrelated to his coal mine employment," the ALJ found that BethEnergy could not carry its burden on rebuttal, and that Pauley was entitled to benefits.

After the ALJ denied its motion for reconsideration, BethEnergy appealed unsuccessfully to the Benefits Review Board. It then sought review in the Court of Appeals for the Third Circuit. That court reversed. It pointed out that the decisions of the ALJ and the Benefits Review Board created "two disturbing circumstances." 890 F. 2d, at 1299. First, the court found it "surely extraordinary," *ibid.*, that a determination that Pauley was totally disabled from causes unrelated to pneumoconiosis, which was sufficient to rebut the presumption under § 727.203(b)(3), would *preclude* respondent BethEnergy from rebutting the presumption under § 410.490(c). Second, the court considered it to be "outcome determinative" that the purpose of the Benefits Act is to provide benefits to miners totally disabled at least in part due to pneumoconiosis if the disability arises out of coal mine employment, and that the ALJ had made unchallenged findings that Pauley's disability did not arise even in part out of such employment. 890 F. 2d, at 1299–1300. The court found it to be "perfectly evident that no set of regulations under [the Benefits Act] may provide that a claimant who is statutorily barred from recovery may nevertheless recover." *Id.*, at 1300.

Asserting that this Court's decision in *Pittston Coal Group* v. *Sebben*, 488 U. S. 105 (1988), was not controlling because that decision concerned only the invocation of the presump-

tion and not its rebuttal, the court then concluded that Congress' mandate that the criteria used by the Secretary of Labor be not more restrictive than the criteria applicable to a claim filed on June 30, 1973, applied only to the criteria for determining whether a claimant is "totally disabled," not to the criteria used in rebuttal. Finally, the court pointed out that its result would not differ if it applied the rebuttal provisions of § 410.490(c) to Pauley's claim, because subsections (c)(1) and (2) make reference to § 410.412(a), which refers to a miner's being "totally disabled due to pneumoconiosis." According to the Third Circuit, there would be no reason for the regulations to include such a reference "unless it was the intention of the Secretary to permit rebuttal by a showing that the claimant's disability did not arise at least in part from coal mine employment." 890 F. 2d, at 1302.

In the two other cases now before us, No. 90–113, *Clinchfield Coal Co.* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor,* and No. 90–114, *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor,* the Court of Appeals for the Fourth Circuit struck down the DOL interim regulations. John Taylor, a respondent in No. 90–113, applied for black lung benefits in 1976, after having worked for almost 12 years as a coal loader and roof bolter in underground coal mines. The ALJ found that Taylor properly had invoked the presumption of eligibility for benefits under § 727.203(a)(3), based on qualifying arterial blood gas studies demonstrating an impairment in the transfer of oxygen from his lungs to his blood. The ALJ then proceeded to weigh the rebuttal evidence, consisting of negative X-ray evidence, nonqualifying ventilatory study scores, and several medical reports respectively submitted by Taylor and by his employer, petitioner Clinchfield Coal Company. In light of this evidence, the ALJ concluded that Taylor neither suffered from pneumoconiosis nor was totally disabled. Rather, the evidence demonstrated that Taylor suffered from chronic bronchitis caused

by 30 years of cigarette smoking and obesity. The Benefits Review Board affirmed, concluding that the ALJ's decision was supported by substantial evidence.

The Court of Appeals reversed. *Taylor* v. *Clinchfield Coal Co.*, 895 F. 2d 178 (1990). The court first dismissed the argument that the DOL interim regulations cannot be considered more restrictive than HEW's as applied to Taylor because Taylor invoked the presumption of eligibility based on arterial blood gas studies, a method of invocation available under the DOL regulations but not under HEW's, and was therefore unable to use the rebuttal provisions of the HEW interim regulations as a benchmark. *Id.*, at 182. The court reasoned that it was a "matter of indifference" how the claimant invoked the presumption of eligibility and rejected the argument that the rebuttal provisions must be evaluated in light of corresponding invocation provisions. "It is the fact of establishment of the presumption and the substance thereof which is of consequence in this case, not the number of the regulation which provides for such establishment." *Ibid.*

Focusing on the DOL's rebuttal provisions in isolation, the Fourth Circuit determined that the third and fourth rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations," because the HEW regulations permit rebuttal "solely through attacks on the element of total disability," while the DOL regulations "allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment." *Ibid.* Accordingly, the court concluded that the DOL interim regulations were more restrictive than those found in § 410.490, and that the application of these regulations violated 30 U. S. C. § 902(f).[3]

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[3] In light of this Court's decision in *Pittston Coal Group* v. *Sebben*, 488 U. S. 105 (1988), the Court of Appeals interpreted § 410.490(c) as permitting rebuttal of the presumption on a showing that the claimant's disability was not caused by coal mine employment. 895 F. 2d, at 183. The court

One judge dissented. Noting that the panel's decision was in conflict with the Sixth Circuit in *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F. 2d 195 (1989), and with the Third Circuit in *Pauley*, he concluded that those decisions "do less violence to congressional intent, and avoid . . . upsetting the statutory scheme." 895 F. 2d, at 184.

Albert Dayton, a respondent in No. 90–114, applied for black lung benefits in 1979, after having worked as a coal miner for 17 years. The ALJ found that Dayton had invoked the presumption of eligibility based on ventilatory test scores showing a chronic pulmonary condition. The ALJ then determined that petitioner Consolidation Coal Company had successfully rebutted the presumption under §§ 727.203(b)(2) and (4) by demonstrating that Dayton did not have pneumoconiosis and, in any event, that Dayton's pulmonary impairment was not totally disabling. The Benefits Review Board affirmed, concluding that the medical evidence demonstrated that Dayton's pulmonary condition was unrelated to coal dust exposure, but was instead secondary to his smoking and "other ailments," and that the ALJ had correctly concluded that Consolidation had rebutted the presumption under § 727.203(b)(4).[4]

The Fourth Circuit reversed. *Dayton* v. *Consolidation Coal Co.*, 895 F. 2d 173 (1990). Relying on its decision in *Taylor*, the court held that 30 U. S. C. § 902(f) required Dayton's claim to be adjudicated "under the less restrictive rebuttal standards of § 410.490." 895 F. 2d, at 175. Concluding that the HEW regulations did not permit rebuttal upon a

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therefore remanded the case for further consideration of that issue. It appears that the Fourth Circuit has since retreated from this view and now considers the HEW interim regulations to permit only two rebuttal methods. See *Robinette* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor*, 902 F. 2d 1566 (1990) (judgment order), cert. pending, No. 90–172.

[4] In light of this conclusion, the Board found it unnecessary to review the determination that Consolidation had successfully rebutted the presumption under subsection (b)(2) of the DOL interim regulations.

showing that the claimant does not have pneumoconiosis, the court stated that the ALJ's finding that Dayton does not have pneumoconiosis "is superfluous and has no bearing on the case." *Id.*, at 176, n.

In view of the conflict among the Courts of Appeals, we granted certiorari in the three cases and consolidated them for hearing in order to resolve the issue of statutory construction. 498 U. S. 937 (1990).[5]

III

We turn to the statutory text that provides that "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable" under the interim HEW regulations. 30 U. S. C. § 902(f)(2). See *Sebben*, 488 U. S., at 113. Specifically, we must determine whether the third and fourth rebuttal provisions in the DOL regulations render the DOL regulations more restrictive than were the HEW regulations. These provisions permit rebuttal of the presumption of eligibility upon a showing that the miner's disability did not arise in whole or in part out of coal mine employment or that the miner does not have pneumoconiosis.[6]

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[5] In addition to the Third Circuit, the Seventh Circuit has concluded that the third rebuttal provision of the DOL interim regulation is not more restrictive than the criteria applied by HEW. See *Patrich* v. *Old Ben Coal Co.*, 926 F. 2d 1482, 1488 (1991). The Seventh Circuit did not address the fourth rebuttal provision. The Sixth Circuit also has refused to invalidate the third and fourth rebuttal provisions of the DOL interim regulation, and continues to apply these provisions to all part C claims, regardless of whether the presumption is invoked under § 410.490 or § 727.203. See *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F. 2d 195, 202 (1989).

[6] In *Sebben*, the Court concluded that the DOL interim regulations were more restrictive than the HEW's to the extent that the DOL's invocation provision did not permit invocation of the presumption without 10 years of coal mining experience. See 488 U. S., at 113. The *Sebben* Court did not address the issue now before us: the validity of the third and fourth rebuttal provisions contained in the DOL interim regulations. See *id.*, at 119.

A

In the BLBRA, Congress specifically constrained the Secretary of Labor's discretion through the directive that the criteria applied to part C claims could "not be more restrictive than" that applied to part B claims. 30 U. S. C. § 902(f)(2). The claimants and the dissent urge that this restriction is unambiguous, and that no deference is due the Secretary's determination that her interim regulations are not more restrictive than HEW's. In the alternative, both the claimants and the dissent argue that regardless of whether the statutory mandate is clear, the only interpretation of the HEW interim regulations that warrants deference is the interpretation given those regulations by the Secretary of HEW. In our view, this position misunderstands the principles underlying judicial deference to agency interpretations, as well as the scope of authority delegated to the Secretary of Labor in the BLBRA.

Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do"); see also Silberman, *Chevron*—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822–824 (1990). As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law. See Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2085–2088 (1990). When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional

delegation of administrative authority"); *Chevron*, 467 U. S., at 864–866.

It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here. The Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations. See *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 152–153 (1991); *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U. S. 380, 390 (1984).

In *Sebben*, we declined to defer to the Secretary's interpretation of the term "criteria" as used in § 902(f)(2), as including only medical but not evidentiary criteria, because we found Congress' intent to include all criteria in that provision to be manifest. See *Sebben*, 488 U. S., at 113–114, 116. With respect to the phrase "not . . . more restrictive than," Congress' intent is similarly clear: The phrase cannot be read except as a delegation of interpretive authority to the Secretary of Labor.

That Congress intended in the BLBRA to delegate to the Secretary of Labor broad policymaking discretion in the promulgation of her interim regulations is clear from the text of the statute and the history of this provision. Congress declined to require that the DOL adopt the HEW interim regulations verbatim. Rather, the delegation of authority requires only that the DOL's regulations be "not . . . more restrictive than" HEW's. Further, the delegation was made with the intention that the program evolve as technological expertise matured. The Senate Committee on Human Resources stated:

> "It is the Committee's belief that the Secretary of Labor should have sufficient statutory authority . . . to

> establish eligibility criteria . . . . It is intended that pursuant to this authority the Secretary of Labor will make every effort to incorporate within his regulations . . . to the extent feasible the advances made by medical science in the diagnosis and treatment of pneumoconiosis . . . since the promulgation in 1972 of the Secretary of HEW's medical eligibility criteria." S. Rep. No. 95–209, p. 13 (1977).

In addition, the Conference Report indicated that the DOL's task was more than simply ministerial when it informed the Secretary that "such [new] regulations shall not provide more restrictive criteria than [the HEW interim regulations], *except* that in determining claims under such criteria all relevant medical evidence shall be considered." H. R. Conf. Rep. No. 95–864, p. 16 (1978) (emphasis added). As delegated by Congress, then, the Secretary's authority to promulgate interim regulations "not . . . more restrictive than" the HEW interim regulations necessarily entails the authority to interpret HEW's regulations and the discretion to promulgate interim regulations based on a reasonable interpretation thereof. From this congressional delegation derives the Secretary's entitlement to judicial deference.

The claimants also argue that even if the Secretary of Labor's interpretation of the HEW interim regulations is generally entitled to deference, such deference would not be appropriate in this instance because that interpretation has changed without explanation throughout the litigation of these cases. We are not persuaded. As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views. See *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, 212–213 (1988). However, the Secretary has held unswervingly to the view that the DOL interim regulations are consistent with the statutory mandate and not more restrictive than the HEW interim regulations. This view obviously informed the structure of the

DOL's regulations. In response to comments suggesting that the DOL's proposed interim regulations might violate § 902(f)(2) because they required that all relevant evidence be considered in determining eligibility, the Secretary replied that "the Social Security regulations, while less explicit, similarly do not limit the evidence which can be considered in rebutting the interim presumption." See 43 Fed. Reg. 36826 (1978). Moreover, this position has been faithfully advanced by each Secretary since the regulations were promulgated. See, *e. g.*, *Sebben*, 488 U. S., at 119. Accordingly, the Secretary's defense of her interim regulations warrants deference from this Court.

B

Having determined that the Secretary's position is entitled to deference, we must decide whether this position is reasonable. See *Chevron*, 467 U. S., at 845. The claimants and the dissent argue that this issue can be resolved simply by comparing the two interim regulations. This argument is straightforward; it reasons that the mere existence of regulatory provisions permitting rebuttal of statutory elements not rebuttable under the HEW interim regulations renders the DOL interim regulations more restrictive than HEW's and, as a consequence, renders the Secretary's interpretation unreasonable. See Tr. of Oral Arg. 22–24. Specifically, the claimants and the dissent assert that the HEW interim regulations plainly contain no provision, either in the invocation subsection or in the rebuttal subsection, that directs factual inquiry into the issue of disability causation or the existence of pneumoconiosis. Accordingly, under the claimants' reading of the regulations, there is no manner in which the DOL interim regulations can be seen to be "not . . . more restrictive than" the HEW regulations.

The regulatory scheme, however, is not so straightforward as the claimants would make it out to be. We have noted before the Byzantine character of these regulations. See *Sebben*, 488 U. S., at 109 (the second presumption is "drafted

in a most confusing manner"); *id.*, at 129 (dissenting opinion) (assuming that the drafters "promulgated a scrivener's error"). In our view, the Secretary presents the more reasoned interpretation of this complex regulatory structure, an interpretation that has the additional benefit of providing coherence among the statute and the two interim regulations.

The premise underlying the Secretary's interpretation of the HEW interim regulations is that the regulations were adopted to ensure that miners who were disabled due to pneumoconiosis arising out of coal mine employment would receive benefits from the black lung program. Under the Secretary's view, it disserves congressional intent to interpret HEW's interim regulations to allow recovery by miners who do not have pneumoconiosis or whose total disability did not arise, at least in part, from their coal mine employment. We agree. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 22, n. 21 (1976) ("[A]n operator can be liable only for pneumoconiosis arising out of employment in a coal mine"); *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs, Dept. of Labor*, 484 U. S., at 158 ("[I]f a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits").

The Secretary and the nonfederal petitioners contend that SSA adjudications under the HEW interim regulations permitted the factual inquiry specified in the third and fourth rebuttal provisions of the DOL regulations. According to the Secretary, subsection (b)(2) of HEW's invocation provisions, and the provisions incorporated by reference into that subsection, do the work of DOL's third and fourth rebuttal methods. Subsection (b)(2) of the HEW interim regulations provides that in order to invoke a presumption of eligibility the claimant must demonstrate that the "impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456)." 20 CFR § 410.490(b)(2) (1990). Section 410.416(a) provides:

> "If a miner was employed for 10 years or more in the Nation's coal mines, and is suffering or suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment."

See also § 410.456.

The Secretary interprets the requirement in § 410.490(b)(2) that the claimant demonstrate that the miner's impairment "arose out of coal mine employment" as comparable to the DOL's third rebuttal provision, which permits the mine operator to show that the miner's disability "did not arise in whole or in part out of coal mine employment." § 727.203(b)(3). With respect to the DOL's fourth rebuttal provision, the Secretary emphasizes that the statute defines pneumoconiosis as "a chronic dust disease . . . arising out of coal mine employment." See 30 U. S. C. § 902(b). Accordingly, she views the reference to §§ 410.416 and 410.456 in HEW's invocation provision, and the acknowledgment within these sections that causation is to be presumed "in the absence of persuasive evidence to the contrary," as demonstrating that a miner who is shown not to suffer from pneumoconiosis could not invoke HEW's presumption.[7]

Petitioners Clinchfield and Consolidation adopt the Third Circuit's reasoning in *Pauley*. The court in *Pauley* relied on the reference in the HEW rebuttal provisions to § 410.412(a)(1), which in turn refers to a miner's being "totally disabled due to pneumoconiosis." The Third Circuit reasoned that this reference must indicate "the intention of the Secretary

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[7] The Court's conclusion in *Sebben* that subsection (b)(2) of HEW's interim regulations was not a rebuttal provision does not foreclose the Secretary's argument, as the *Sebben* Court made clear that that provision was, nonetheless, a "substantive requirement." See *Sebben*, 488 U. S., at 120. We agree with the *Patrich* court that "there is no meaningful difference between a procedure which creates a presumption and then allows evidence to rebut it and one which denies the presumption in the first place if the same evidence is offered." See *Patrich*, 926 F. 2d, at 1488.

[of HEW] to permit rebuttal by a showing that the claimant's disability did not arise at least in part from coal mine employment." 890 F. 2d, at 1302.

The claimants respond that the Secretary has not adopted the most natural reading of subsection (b)(2). Specifically, the claimants argue that miners who have 10 years of coal mine experience and satisfy the requirements of subsection (b)(1) automatically obtain the presumption of causation that § 410.416 or § 410.456 confers, and thereby satisfy the causation requirement inherent in the Act. In addition, the claimants point out that the reference in the HEW rebuttal provisions to § 410.412(a)(1) may best be read as a reference only to the definition of the term "comparable and gainful work," not to the disability causation provision of § 410.412(a). While it is possible that the claimants' parsing of these impenetrable regulations would be consistent with accepted canons of construction, it is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 115 (1988). Rather, the Secretary's view need be only reasonable to warrant deference. *Ibid.*; *Mullins*, 484 U. S., at 159.

The claimants' assertion that the Secretary's interpretation is contrary to the plain language of the statute ultimately rests on their contention that subsections (b)(1)(i) and (ii) of the HEW interim regulations create a "conclusive" presumption of entitlement without regard to the existence of competent evidence demonstrating that the miner does not or did not have pneumoconiosis or that the miner's disability was not caused by coal mine employment. This argument is deficient in two respects. First, the claimants' premise is inconsistent with the text of the authorizing statute, which expressly provides that the presumptions in question will be rebuttable, see 30 U. S. C. §§ 921(c)(1), (2), and (4), and re-

quires the Secretary of HEW to consider all relevant evidence in adjudicating claims under part B. See § 923(b).[8]

Second, the presumptions do not by their terms conclusively establish any statutory element of entitlement. In setting forth the two rebuttal methods in subsection (c), the Secretary of HEW did not provide that they would be the exclusive methods of rebuttal. In fact, the claimants admit that "conclusively presume" is a term they "coined" for purposes of argument. Tr. of Oral Arg. 34. Although the delineation of two methods of rebuttal may support an inference that the drafter intended to exclude rebuttal methods not so specified, such an inference provides no guidance where its application would render a regulation inconsistent with the purpose and language of the authorizing statute. See Sunstein, 90 Colum. L. Rev., at 2109, n. 182 (recognizing that the principle *expressio unius est exclusio alterius* "is a questionable one in light of the dubious reliability of inferring specific intent from silence"); cf. *Commercial Office Products Co.*, 486 U. S., at 120 (plurality opinion) (rejecting the more natural reading of statutory language because such an inter-

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[8] That no element of the presumptions at issue was intended to be conclusive is further indicated by the language of the remaining two provisions in this section of the statute. In § 921(c)(3), Congress demonstrated its ability to create an irrebuttable presumption, applicable to a miner for whom the medical evidence demonstrates the presence of complicated pneumoconiosis. Perhaps more telling is § 921(c)(4), the only section of the statute in which Congress addressed the available methods of rebuttal. In that section, Congress created a rebuttable presumption of eligibility applicable to a miner with 15 years or more of coal mine employment, for whom evidence demonstrates the existence of a totally disabling respiratory disease but whose X rays do not reveal complicated pneumoconiosis. With respect to this presumption, Congress expressly provided: "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Written as a limiting provision, this section indicates Congress' understanding that these rebuttal methods are among those permitted with respect to other presumption provisions.

pretation would lead to "absurd or futile results . . . plainly at variance with the policy of the legislation as a whole") (internal quotation marks omitted).

In asserting that the Secretary's interpretation is untenable, the claimants essentially argue that the Secretary is not justified in interpreting the HEW interim regulations in conformance with their authorizing statute. According to the claimants, the HEW officials charged with administering the black lung benefits program and with drafting the HEW interim regulations believed that it was virtually impossible to determine medically whether a miner's respiratory impairment was actually caused by pneumoconiosis or whether his total disability arose out of his coal mine employment. Faced with such medical uncertainty, and instructed to ensure the "prompt and vigorous processing of the large backlog of claims," see 20 CFR § 410.490(a) (1990), the claimants assert that HEW omitted from its criteria factual inquiries into disability causation and the existence of pneumoconiosis based on a "cost/benefit" conclusion that such inquiries would engender inordinate delay yet generate little probative evidence.[9] The dissent presents a similar view. *Post*, at 716–719.

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[9]The claimants support this argument by reference to the HEW's Coal Miner's Benefits Manual (1979), which they claim represents the agency's contemporaneous interpretation of its regulation. Claimants assert that the manual "nowhere suggests" that the HEW interim regulations permit factual inquiry into the existence of pneumoconiosis or disability causation. The manual, however, does not demonstrate that HEW understood its interim regulations to preclude rebuttal with facts similar to DOL's third and fourth rebuttal provisions. At best, this document is ambiguous with respect to the statutory elements susceptible of rebuttal. See Manual, Part IV, § IB6(e) (stating that the presumption of entitlement to benefits "may be rebutted if . . . (3) Biopsy or autopsy findings clearly establish that no pneumoconiosis exists"). We find it more revealing that, in outlining the general structure of the interim regulations, the manual makes clear that "[t]o establish entitlement to benefits on the basis of a coal miner's total disability due to pneumoconiosis, a claimant must submit the evidence necessary to establish that he is a coal miner . . . who is . . . totally disabled

We recognize that the SSA, under the HEW interim regulations, appeared to award benefits to miners whose administrative files contained scant evidence of eligibility. See The Comptroller General of the United States, General Accounting Office, Report to Congress: Examination of Allegations Concerning Administration of the Black Lung Benefits Program 6–10 (1976), included in Hearings on H. R. 10760 and S. 3183 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 440–444 (1976). We are not, however, persuaded that this circumstance requires the Secretary to award black lung benefits to claimants who do not have pneumoconiosis or whose disability did not arise in whole or in part out of coal mine employment. As an initial matter, contemporaneous analyses of claims approved by the HEW provide little support for the argument that the HEW made a "cost/benefit" decision to forgo inquiry into disease existence or disability causation. Rather, many of the claims allegedly awarded on the basis of insufficient evidence involved miners who were unable to present sufficient evidence of medical disability, not those who did not suffer from pneumoconiosis or were disabled by other causes. See *ibid.*; see also The Comptroller General of the United States, General Accounting Office, Program to Pay Black Lung Benefits to Miners and Their Survivors—Improvements Are Needed 45–47 (1977); H. R. Rep. No. 95–151, pp. 73–74 (1977) (Minority Views and Separate Views). Moreover, this argument ignores entirely the advances in medical technology that have occurred since the promulgation of the HEW interim regulations, advances that Congress could not have intended either HEW or the DOL to ignore in administering the program. See S. Rep. No. 95–209, p. 13 (1977).

Finally, we do not accept the implicit premise of this argument: that the Secretary cannot prevail unless she is able to

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due to pneumoconiosis, and that his pneumoconiosis arose out of employment in the Nation's coal mines." *Id.*, Part IV, § IB1.

demonstrate that her interpretation of the HEW interim regulations comports with HEW's contemporaneous interpretation of those regulations. As is stated above, the Secretary's interpretation of HEW's interim regulations is entitled to deference so long as it is reasonable. An interpretation that harmonizes an agency's regulations with their authorizing statute is presumptively reasonable, and claimants have not persuaded us that the presumption is unfounded in this case.

IV

We conclude that the Secretary of Labor has not acted unreasonably or inconsistently with 30 U. S. C. § 902(f)(2) in promulgating interim regulations that permit the presumption of entitlement to black lung benefits to be rebutted with evidence demonstrating that the miner does not, or did not, have pneumoconiosis or that the miner's disability does not, or did not, arise out of coal mine employment. Accordingly, we affirm the judgment of the Third Circuit in No. 89–1714. The judgments of the Fourth Circuit in No. 90–113 and No. 90–114 are reversed, and those cases are remanded for further proceedings consistent with this opinion. No costs are allowed in any of these cases.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this litigation.

JUSTICE SCALIA, dissenting.

I respectfully dissent. The disputed regulatory language is complex, but it is not ambiguous, and I do not think *Chevron* deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), requires us to accept the strained and implausible construction advanced by the Department of Labor (DOL). In my judgment at least one of the claimants before us is entitled to benefits under the statute.

I

A

As an initial matter, the Court misconstrues our *Chevron* jurisprudence. *Chevron* requires that we defer to an agency's interpretation of its organic statute once we determine that that statute is ambiguous. No one contends that the relevant *statutory* language ("shall not be more restrictive than") is ambiguous. See *Pittston Coal Group* v. *Sebben*, 488 U. S. 105, 113–114 (1988) (explaining that particular phrase). The only serious question surrounds the regulations of the then-extant Department of Health, Education, and Welfare (HEW) to which the statute refers. I agree that those regulations are complex, perhaps even "Byzantine," *ante*, at 699—but that alone is insufficient to invoke *Chevron* deference. Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. *Chevron* is a recognition that the ambiguities in statutes are to be resolved by the agencies charged with implementing them, not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us. In my view the HEW regulations referred to by the present statute are susceptible of only one meaning, although they are so intricate that that meaning is not immediately accessible.

But even if the regulations were ambiguous, it would not follow that the Secretary of Labor is entitled to deference. Nothing in our *Chevron* jurisprudence requires us to defer to one agency's interpretation of another agency's ambiguous regulations. We rejected precisely that proposition in *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144 (1991), in holding that the Occupational Safety and Health Review Commission (OSHRC) was not entitled to deference in interpreting the Secretary of Labor's regulations. Having used *Chevron* to rebuff OSHRC's incursions

there, it seems a bit greedy for the Secretary to use *Chevron* to launch the DOL's own cross-border attack here. In my view, the only legitimate claimant to deference with regard to the present regulations is the agency that drafted them.

B

In any event, the interpretive issue here is, in my view, much less difficult than the Court suggests. Title 30 U. S. C. § 902(f)(2) states: "Criteria applied by the Secretary of Labor . . . [to black lung claims filed prior to April 1, 1980,] shall not be more restrictive [*i. e.*, shall not be less favorable to claimants] than the criteria applicable to a claim filed on June 30, 1973." The criteria applied by the Secretary of Labor are as follows:

> "§ 727.203 Interim Presumption.
>
> "(a) *Establishing interim presumption.* A miner who engaged in coal mine employment . . . will be presumed to be totally disabled due to pneumoconiosis . . . if one of the following medical requirements is met:
>
> "(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);
>
> "(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . .
>
> "(3) Blood gas studies . . . demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood . . .
>
> "(4) Other medical evidence . . . establishes the presence of a totally disabling respiratory or pulmonary impairment;
>
> . . . . .
>
> "(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

"(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

"(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

"(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

"(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis." 20 CFR § 727.203 (1990).

The criteria governing claims filed on June 30, 1973, were set forth in HEW interim regulations, 20 CFR § 410.490, which provide in relevant part:

"(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, . . . such miner will be presumed to be totally disabled due to pneumoconiosis . . . if:

"(1) One of the following medical requirements is met:

"(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

"(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . .

"(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

. . . . .

"(c) *Rebuttal of Presumption.* The presumption in paragraph (b) of this section may be rebutted if:

"(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

"(2) Other evidence, including physical performance tests . . . establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1))."

The relationship between the two regulations is apparent because they use a similar structure and, in large part, similar language. Both allow claimants to invoke a presumption of disability due to pneumoconiosis upon the presentation of certain medical evidence (the HEW regulations provide for two types of medical evidence while the DOL regulations provide for four). Both specify certain ways in which that presumption may be rebutted. The HEW regulations, however, specify only two methods of rebuttal (both relating to the extent of the disability), while the DOL regulations authorize four methods (the two expressed in the HEW regulations plus two more: (1) that pneumoconiosis did not cause the disability, and (2) that the miner does not have pneumoconiosis).

Obviously, if the DOL regulations provide more opportunities for rebuttal, they are less favorable to claimants. I think it quite apparent that they do. The present case is illustrative. Claimant Pauley invoked the presumption by submitting X-ray evidence of pneumoconiosis, pursuant to § 727.203(a)(1). BethEnergy, the employer, rebutted the presumption by arguing pursuant to § 727.203(b)(3) that although Pauley had pneumoconiosis it did not cause his disability. Had the case proceeded under the HEW regulations, Pauley's presentation would have been the same, under § 410.490(b)(1)(i), the counterpart of § 727.203(a)(1).[1]

[1] The HEW regulations also contain a separate provision that would have required Pauley to show that his medical condition arose from working in a coal mine. § 410.490(b)(2). While that requirement is not set forth as a separate provision in the DOL regulations, it is presumably a

For BethEnergy, however, things would have been different: § 727.203(b)(3) does not have a counterpart in the HEW regulations. The only rebuttal expressly contemplated by the HEW regulations is that the claimant is not in fact disabled—but Pauley concededly was. It appears, therefore, that BethEnergy could not have challenged the causal link between the pneumoconiosis and the disability under the HEW regulations and thus would have had no defense.

In my view this argument is self-evidently correct and is obscured only by the technical complexity of the regulatory provisions. But the statutory *structure*, as opposed to the actual language, is simple. Under the HEW regulations, we assume "x," but "x" may be rebutted by a showing of "a" or "b." Under the DOL regulations, we likewise assume "x," but "x" may be rebutted by a showing of "a" or "b" *or* "c" *or* "d." It defies common sense to argue that, given this structure, the two regulations are in fact identical, and that Pauley, whose claim could be defeated by a showing of "c" but not by a showing of "a" or "b," was no worse off under the latter regime. Yet that is precisely the argument the Court accepts.

Pauley's commonsense reading is further supported by the fact that there is nothing remarkable about the HEW regulations' severely limiting rebuttal. The introduction to those regulations states:

> "In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under

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part of § 727.203(b)(4), which requires that the miner have pneumoconiosis. Pneumoconiosis is specifically defined as a disease arising from work in a coal mine. 30 U. S. C. § 902(b). It is not contested that Pauley's pneumoconiosis arose from work in the mine—only that it, rather than his other ailments, was the cause of his disability.

> present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims . . . ." § 410.490(a).

In this context, the limitation on rebuttal makes perfect sense. Litigation over the existence of pneumoconiosis was circumscribed: If the claimants introduced specified types of medical evidence supporting their claim, that portion of the case would be deemed established—thus avoiding the time-consuming exchange of conflicting medical evidence which, given the technology and scientific knowledge then available, was likely to be inconclusive in any event. Similarly, litigation over the causal link between the disease and the disability—which poses even more difficult medical questions—was eliminated entirely by the presumption that if a miner had pneumoconiosis and was disabled, he was disabled because of pneumoconiosis. On the other hand, the regulations permitted full litigation as to the existence of a disability, an area where medical and scientific knowledge was equal to the task and where agencies (and courts) typically think themselves able to make reasoned assessments.[2]

In addition, apparently the interim regulations were at the time thought to limit rebuttal. Literally thousands of cases were decided pursuant to these regulations in the 1970's; neither the Government nor the employers have cited a single

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[2] In its permanent regulations HEW did not use the § 410.490 interim presumption. Significantly, the permanent regulations also outlined an extensive procedure for contesting the link between a miner's pneumoconiosis and his disabilities. See § 410.426. The fact that this provision was not contained in the interim procedures suggests that HEW thought disability causation would not be an issue there—and conforms to the view, see § 410.490(a), that the interim presumptions would serve as a blunt instrument for adjudication until full evidentiary procedures could be developed.

instance in which the rebuttal allowed by the DOL regulations was permitted or indeed was even advanced, nor have they cited a single comment by the Secretary of HEW, any claimant, or any commentator suggesting that such rebuttal was available. I do not find that extraordinary. In my view that is the only reasonable reading of the regulations, and it is unsurprising that no one thought to read them otherwise. Indeed, that is precisely how we read them in *Pittston Coal.* Although the question was not specifically before the Court, in generally describing the two sets of regulations, we stated:

> "[T]he rebuttal provisions of the interim Labor regulation . . . permi[t] rebuttal *not only* on the grounds available in the interim HEW regulation (§ 410.490(c)), *but also* on the basis that 'the total disability or death of the miner did not arise in whole or in part out of coal mine employment' or that 'the miner does not, or did not, have pneumoconiosis.' See §§ 727.203(b)(1)–(4)." 488 U. S., at 111 (emphasis added).

II

Although I think the HEW regulations clear (albeit complex) on their face, I turn now to the specific arguments why they should nevertheless not be read to limit rebuttal opportunities.

A

First, the Government contends that the HEW rebuttal provisions actually include the two new rebuttal provisions apparently added by DOL. The principal claim here centers upon subsection (b)(2) of the HEW regulations. That provision states that the claimant must demonstrate that the "impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment." 20 CFR § 410.490(b)(2) (1990). This requirement, the Government insists, is comparable to DOL's third rebuttal provision, which permits the employer to show that the miner's disabil-

ity did not arise from coal mine employment. That argument might be correct if "impairment" in subsection (b)(2) of the HEW regulations meant the same as "disability" in the DOL regulations. It does not. Subsection (b)(2) of the HEW regulations refers to the "impairment" established in subsection (b)(1); that subsection discusses proof of the existence of pneumoconiosis. The (b)(2) "impairment," then, is the disease itself. Thus, it is open to the employer under the HEW regulations to show, for example, that Pauley's *pneumoconiosis* did not arise from coal mine employment. But here everyone agrees that it did—the relevant question is whether Pauley's *disability* arose from his pneumoconiosis. That is where DOL diverges from HEW, for DOL's regulations allow proof that the *disability* did not arise from the disease and thus from coal mine employment; the HEW regulations require only a showing that the *impairment*—*i. e.*, the pneumoconiosis—arose from coal mine employment and presume the causal link between the impairment and the disability.

The Government contends that subsection (b)(2) of the HEW regulations also equates with the fourth rebuttal provision of the DOL regulations. The fourth rebuttal provision allows rebuttal on the ground that the claimant does not have pneumoconiosis. I think the Government's argument is partially correct—but only partially. As the Government notes, proof of pneumoconiosis involves proof of two elements: (1) a chronic dust disease, which (2) arose from coal mine employment. Subsection (b)(1) of the HEW regulations says the claimant must prove the first point, and says how to do it (by submitting the specified medical evidence and thereby raising the presumption). Subsection (b)(2) says that the claimant must also prove the second point (to which the presumption is irrelevant). To contest a finding of pneumoconiosis, the employer may wish to argue either (1) that the miner has a chronic dust disease but it did not arise from coal mine employment; or (2) that the miner does not have a chronic dust

disease. Subsection (b)(2) of the HEW regulations allows the employer to argue the former, but it says nothing about the latter; and subsection (b)(1) bars the latter argument, via the presumption, if the miner offers the specified medical evidence. DOL's fourth rebuttal allows the employer to argue either point—and thus, impermissibly, offers additional recourse to the employer.

The employers offer yet another contortion of the statute to the same effect. Section 410.490(c) states that rebuttal may be made through "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see §410.412(a)(1))." The provision incorporated by reference reads as follows:

> "(a) A miner shall be considered totally disabled due to pneumoconiosis if:
>
> "(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time . . . ."

Because this provision begins with references to the miner's disability due to pneumoconiosis, the employers believe it would be reasonable to construe it as authorizing the argument either that the miner does not have the disease or that the disease is not causing the disability. I do not find this a plausible explanation of the reference to §410.412(a)(1). The logical reason for cross-referencing that provision was to include within the explicit rebuttal provision the more complete definition of "gainful work" that the incorporated section affords. Had HEW intended to create additional rebuttal provisions, it would simply have done so, explicitly and in parallel with the other rebuttal provisions, rather than backhandedly, through the incorporation by reference.

The Court apparently concedes that the companies' cross-reference argument is not the most natural reading of the

statute, but concludes that "the Secretary's view need be only reasonable to warrant deference." *Ante*, at 702. While I do not even think the foregoing argument reasonable (nor do I think the Secretary entitled to deference, see *supra*, at 707–708), I note that the Secretary herself does not advance it. Certainly private parties' speculation as to what the Secretary could have thought warrants no deference.

B

The Government's second line of attack centers upon its claim that the HEW regulations, if read to limit rebuttal, would violate the Black Lung Benefits Act of 1972. That argument has potential force, for we are more willing to depart from the natural import of language when adhering to it would render a regulation unauthorized or a statute unconstitutional. It is important to note at the outset, however, that the Government has a heavy burden in this regard. Had the HEW regulations been challenged before this Court as inconsistent with the statute, we would have owed *Chevron* deference to the Secretary (of HEW). The Government's present argument depends on a showing, not that a natural reading of the HEW regulations produces less than the best reading of the statute, but that it produces an *unreasonable* one.

The Government argues, and the Court accepts, that "it disserves congressional intent to interpret HEW's interim regulations to allow recovery by miners who do not have pneumoconiosis or whose total disability did not arise, at least in part, from their coal mine employment," *ante*, at 700, and thus HEW must have permitted rebuttal on these grounds even if its regulations did not say so. I think that most unlikely. Any adjudication of claims necessarily involves a tradeoff between the speed and the accuracy of adjudication. As discussed above, the HEW presumptions were avowedly designed to enhance speed at the expense of accuracy, see § 410.490(a), pending the development of more

reliable procedures. As with all presumptions, their preclusion of full litigation of some issues left open the possibility that some claimants would receive benefits to which, in a perfect world, they would not be entitled. That is a necessary consequence of attempting to resolve complex and possibly indeterminate claims with a minimum of delay. I cannot say that in striking such a balance HEW violated a clear policy of Congress, for Congress itself had taken up the black lung issue in 1972 in part because of a perception that adjudication of claims was moving too slowly.

It is next argued that certain specific provisions of the authorizing statute mandate the methods of rebuttal later adopted by DOL. Specifically, according to the Court, "the authorizing statute . . . expressly provides that the presumptions in question will be rebuttable, see 30 U. S. C. §§ 921(c)(1), (2), and (4), and requires the Secretary of HEW to consider all relevant evidence in adjudicating claims . . . . See 30 U. S. C. § 923(b)." *Ante*, at 702–703. I see nothing in § 921, however, that contradicts HEW's limitation on rebuttal. Section 921(c)(1) provides: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." That provision is simply irrelevant to the issue of whether rebuttal must be allowed as to either the existence of pneumoconiosis or the causal link between the disease and the disability. The HEW regulations do not purport to establish an irrebuttable presumption relating to the link between the disease and employment in coal mines.

Slightly more on point is § 921(c)(2), which provides: "If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis." It is plausible to read that section as foreclosing HEW from establishing an *irrebuttable* presumption of causation based solely on death after 10 years' service.

But that is not what the HEW regulations do. Rather, they establish an irrebuttable presumption based upon 10 years' service plus substantial additional medical evidence. It is not inconsistent to say that certain evidence establishes a rebuttable presumption and additional, more persuasive evidence establishes an irrebuttable presumption.

Section 921(c)(4) is the most relevant, for it establishes a presumption of disability based upon a showing of pneumoconiosis. It then states in relevant part that "[t]he Secretary *may* rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis . . . ." (Emphasis added.) It is true that this rebuttal provision tracks the fourth rebuttal provision of the DOL regulations. However, § 921(c)(4) is *permissive*. It establishes the ways in which the Secretary *may* rebut a presumption but does not *require* that the Secretary use them. It is not inconsistent with the statute for the Secretary to decide that such rebuttal attempts would involve more administrative expense than they could justify and thus to adopt regulations declining to exercise the option.

In my view, the only colorable claim to a statutory conflict is based on § 923(b), which provides in part that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered." The Government argues with some force that this precludes the use of presumptions that do not allow the introduction of all relevant evidence. That is an unanswerable argument with respect to evidence offered *by* the claimants. I think it reasonably maintainable, however, that the preclusion does not apply to evidence offered *against* them. At the time the interim regulations were adopted, HEW, not the employers, paid the benefits required under the Act. In adopting its presumptions, HEW was limiting the evidence it could offer to sustain its own position. The presumption provisions were, in effect, a waiver—which may well have been based upon compelling considerations of administrative efficiency. I think the stat-

ute is at least ambiguous as to whether the Secretary could elect not to contest claims based on certain evidence. Since we owe the Secretary (of HEW) *Chevron* deference in construing the statute, I cannot say that, if the Secretary had taken that position (as he apparently did in promulgating the regulations), we would not have accepted it as a permissible interpretation.

C

The Government's final argument is that the HEW regulations do not expressly preclude rebuttal on grounds other than those specified. Thus, even if expanded rebuttal is not specifically provided for, neither is it foreclosed; the statute adopting the HEW regulations is simply ambiguous as to its availability, and we should defer to DOL's view that it should exist. It is true that the HEW regulations do not say that these are the *only* two ways to rebut the presumption. That is, however, the reasonable implication, as is suggested by the hoary canon of construction, *expressio unius est exclusio alterius*. When a provision sets forth a general rule followed by specific exceptions to that rule, one must assume—absent other evidence—that no further exceptions are intended. The Court argues that the principle of *expressio unius* is not absolute, and may be rejected where its application "would render a regulation inconsistent with the purpose and language of the authorizing statute." *Ante*, at 703. That is assuredly true; it is only one of many possible indications of meaning. Cf. *Burns* v. *United States*, *ante*, at 136–138 (invocation of *expressio unius* inappropriate where it would lead to absurd and arguably unconstitutional results). It is a strong indication, however, and the problem here is that there are no others. As discussed above, limitation of rebuttal is not contrary to the text or purpose of the authorizing statute, and neither the Government nor the Court offers any other reason for thinking that the listed exceptions are not exclusive.

III

In sum, the DOL regulations impermissibly exceed the HEW regulations in at least two respects: (1) they allow employers to argue that a miner who has pneumoconiosis and is disabled is nevertheless not disabled due to the pneumoconiosis, and (2) where a miner has submitted specified evidence of a chronic dust disease, they allow the employer to challenge not only whether the disease is coal related, but whether the disease exists. That was the view of these regulations we expressed in *Pittston Coal*, see 488 U. S., at 111, and I see no reason to reconsider.[3] As to claimant Pauley, that divergence is conclusive, at least as far as the statute is concerned. (I do not address constitutional challenges to the statute, as these were not passed upon below.) The employer's only defense was that Pauley's pneumoconiosis was not the cause of his disability, and that defense was foreclosed under the HEW regulations. Thus, I would reverse in No. 89–1714. Claimant Dayton presents a more difficult case. He submitted ventilation studies showing a disease resembling pneumoconiosis. The employer wishes to argue that he does not have pneumoconiosis. As I read the regulations, the employer may not challenge the conclusion that Dayton has a pneumoconiosis-like disease, but may (depending upon the effect of other provisions not argued here) claim that the disease did not arise from coal mine employment. Since it is not clear on the present record which of these positions the employer is advocating, I would remand in No. 90–114. Finally, I agree with the Court that claimant Taylor is entitled to no relief. Taylor invoked the presumption of disability via a blood gas test, § 727.203(a)(3). That was not an approved method of invoking the presumption under the HEW regulations. Taylor cannot complain that DOL has treated him less well than HEW would have in allowing the

[3] Even if the Secretary of Labor were the proper party to claim *Chevron* deference in interpreting these regulations, I find her arguments to the contrary so implausible that I would not accept them in any event.

presumption to be rebutted, since under the HEW regulations he would not have been entitled to the presumption in the first place. Accordingly, I would reverse in No. 90–113.

For the foregoing reasons, I respectfully dissent.

COLEMAN *v.* THOMPSON, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89–7662. Argued February 25, 1991—Decided June 24, 1991

After a Buchanan County jury convicted petitioner Coleman of capital murder, he was sentenced to death, and the Virginia Supreme Court affirmed. He then filed a habeas corpus action in the County Circuit Court, which, after a 2-day evidentiary hearing, ruled against him on numerous federal constitutional claims that he had not raised on direct appeal. He filed a notice of appeal with that court 33 days after it entered its final judgment and subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth moved to dismiss the appeal on the sole ground that the notice of appeal was untimely under the Supreme Court's Rule 5:9(a), which requires that such a notice be filed within 30 days of final judgment. After both parties filed several briefs on the subject of the dismissal motion and on the merits of Coleman's claims, the Supreme Court granted the motion "upon consideration [o]f" the filed papers. Coleman next filed a habeas petition in the Federal District Court, presenting, *inter alia*, seven federal constitutional claims he had first raised in state habeas. Among other things, the court concluded that, by virtue of the dismissal of his state habeas appeal, Coleman had procedurally defaulted the seven claims. The Court of Appeals affirmed, rejecting Coleman's argument that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, such that the federal courts could not treat it as such under *Harris* v. *Reed*, 489 U. S. 255. The court concluded that federal review of the claims was barred, since the Virginia Supreme Court had met *Harris*' "plain statement" requirement by granting a motion to dismiss that was based solely on procedural grounds, since that decision rested on independent and adequate state grounds, and since Coleman had not shown cause to excuse the default.

Held: Coleman's claims presented for the first time in the state habeas proceeding are not subject to review in federal habeas. Pp. 729–757.

(a) Because of comity and federalism concerns and the requirement that States have the first opportunity to correct their own mistakes, federal habeas courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the fed-

eral question and adequate to support the prisoner's continued custody. See, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 81, 87. Pp. 729–732.

(b) Since ambiguous state court decisions can make it difficult for a federal habeas court to apply the independent and adequate state ground doctrine, this Court has created a conclusive presumption that there is no such ground if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not "clearly and expressly" rely on an independent and adequate state ground. See *Harris*, *supra*, at 261, 266; *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041. Pp. 732–735.

(c) There is no merit to Coleman's contention that the *Harris* presumption applies in all cases in which the state habeas court's decision does not "clearly and expressly" state that it was based on an independent and adequate state ground. The holding of *Harris*, *supra*, is not changed by the fact that, in one particular exposition of its rule, *id.*, at 263, the Court announced the "plain statement" requirement without mentioning the predicate requirement that the state court's decision must fairly appear to rest primarily on, or to be interwoven with, federal law. The *Harris* presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases. Coleman's proposed rule would greatly and unacceptably expand the risk of improper federal review in those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds. Applying Coleman's rule would have very little benefit to the federal courts in such cases, since their task of determining the scope of the state court judgment would not be difficult. On the other hand, that rule would place great burdens on the States, which, if their courts neglected to provide a clear and express statement of procedural default, would have to respond to federal habeas review of the federal claims of prisoners in state custody for independent and adequate state law reasons, would have to pay the price in terms of the uncertainty and delay added to the enforcement of their criminal laws, and would have to retry the petitioner if the federal courts reversed his conviction. Coleman's rule would also burden the state courts, which would have to incorporate "plain statement" language in every state appeal and every denial of state collateral review that was potentially subject to federal review. Pp. 735–740.

(d) The *Harris* presumption does not apply in this case. The Virginia Supreme Court's dismissal order "fairly appears" to rest primarily on state law, since it does not mention federal law and granted the Commonwealth's dismissal motion, which was based solely on Coleman's failure to meet Rule 5:9(a)'s time requirements. There is no merit to Cole-

man's argument that the dismissal was not independent of federal law because the Virginia court applied its procedural bar only after determining that doing so would not abridge one of his federal constitutional rights, such that federal review is permissible under *Ake* v. *Oklahoma*, 470 U. S. 68, 75. Even if *Ake*, a direct review case, applies here, it does Coleman no good because the Virginia court relied on an independent state procedural ground. Moreover, it is clear that the rule of *Tharp* v. *Commonwealth*, 211 Va. 1, 3, 175 S. E. 2d 277, 278—in which the Virginia court announced that it would no longer allow extensions of time for filing *petitions for writs of error with the Supreme Court* unless denial of an extension would abridge a constitutional right—was not applied here, where it was Coleman's *notice of appeal in the trial court* that was late. And, although in *O'Brien* v. *Socony Mobil Oil Co.*, 207 Va. 707, 709, 152 S. E. 2d 278, 280, the Virginia court reviewed the merits of a constitutional claim before dismissing the case on the basis of an untimely civil notice of appeal, it also expressly declined to announce a rule that there is a constitutional exception to the notice of appeal time requirement. While some ambiguity is added to this case by the fact that the Virginia Supreme Court's dismissal order was issued "[u]pon consideration" of all the filed papers, including those discussing the merits of Coleman's federal claims, this Court cannot read that ambiguity as overriding the Virginia court's explicit grant of a dismissal motion based solely on state procedural grounds independent of federal law. This Court also accepts the Court of Appeals' conclusion that the procedural bar was adequate to support the judgment, since Coleman did not petition for certiorari on this question. Pp. 740–744.

(e) In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Cf., *e. g.*, *Murray* v. *Carrier*, 477 U. S. 478, 485, 495; *Harris*, *supra*, at 262. Although Coleman would be entitled to relief if the "deliberate bypass" standard set forth in *Fay* v. *Noia*, 372 U. S. 391, 438–439, still applied, that standard has been superseded by the Court's subsequent decisions applying the cause and prejudice standard. The *Fay* standard was based on a conception of federal/state relations that undervalued the important interest in finality served by state procedural rules and the significant harm to the States that results from the failure of federal courts to respect them. Cf. *McCleskey* v. *Zant*, 499 U. S. 467, 491. Pp. 744–751.

(f) Coleman's contention that it was his attorney's error that led to the late filing of his state habeas appeal cannot demonstrate "cause" under the foregoing standard. *Carrier, supra*, at 488, establishes that attorney error can be "cause" only if it constitutes ineffective assistance of counsel violative of the Sixth Amendment. Because there is no constitutional right to an attorney in state postconviction proceedings, see, *e. g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings, see *Wainwright* v. *Torna*, 455 U. S. 586. Although Coleman argues that attorney error may be of sufficient magnitude to excuse a procedural default in federal habeas even though no Sixth Amendment claim is possible, this argument is inconsistent with the language and logic of *Carrier, supra*, at 488, which explicitly says that, in the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation. Pp. 752–754.

(g) Nor is there merit to Coleman's contention that, at least as to the federal ineffective assistance claims that he first presented to the state habeas trial court, attorney error in his state habeas appeal must constitute "cause" because, under Virginia law at the time of his trial and direct appeal, claims of that type could be brought only in state habeas. Although an indigent criminal defendant is constitutionally entitled to an effective attorney in his "one and only appeal . . . as of right," *Douglas* v. *California*, 372 U. S. 353, 357, 358; *Evitts* v. *Lucey*, 469 U. S. 387, Coleman has had his "one and only appeal" as to the claims in question, since the County Circuit Court fully addressed and denied those claims. He does not have a constitutional right to counsel on appeal from *that* determination. Cf., *e. g.*, *Finley, supra*, at 556. Thus, since any attorney error that lead to the default of those claims cannot constitute "cause," and since Coleman does not argue in this Court that federal review of the claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing the claims in federal habeas. Pp. 755–757.

895 F. 2d 139, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 757. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 758.

John H. Hall argued the cause for petitioner. With him on the briefs were *Daniel J. Goldstein* and *Richard G. Price*.

Donald R. Curry, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *Stephen D. Rosenthal*, Deputy Attorney General, and *Jerry P. Slonaker*, Senior Assistant Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

I

A Buchanan County, Virginia, jury convicted Roger Keith Coleman of rape and capital murder and fixed the sentence at

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*Briefs of *amici curiae* urging affirmance were filed for the State of Kentucky et al. by *Frederic J. Cowan*, Attorney General of Kentucky, and *Ian G. Sonego*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Winston Bryant* of Arkansas, *Gale Norton* of Colorado, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Warren Price III* of Hawaii, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Don Stenbert* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Lacy H. Thornburg* of North Carolina, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Paul Van Dam* of Utah, *Ken Eikenberry* of Washington, and *Mario Palumbo* of West Virginia; for the State of Texas et al. by *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Executive Assistant Attorney General, and *Michael P. Hodge*, *Robert S. Walt*, *Dana E. Parker*, and *Margaret Portman Griffey*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Charles E. Cole* of Alaska, *Daniel E. Lungren* of California, *Michael C. Moore* of Mississippi, *Robert H. Henry* of Oklahoma, *Mark Barnett* of South Dakota, and *Joseph B. Meyer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

death for the murder. The trial court imposed the death sentence, and the Virginia Supreme Court affirmed both the convictions and the sentence. *Coleman* v. *Commonwealth*, 226 Va. 31, 307 S. E. 2d 864 (1983). This Court denied certiorari. 465 U. S. 1109 (1984).

Coleman then filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County, raising numerous federal constitutional claims that he had not raised on direct appeal. After a 2-day evidentiary hearing, the Circuit Court ruled against Coleman on all claims. App. 3–19. The court entered its final judgment on September 4, 1986.

Coleman filed his notice of appeal with the Circuit Court on October 7, 1986, 33 days after the entry of final judgment. Coleman subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth of Virginia, as appellee, filed a motion to dismiss the appeal. The sole ground for dismissal urged in the motion was that Coleman's notice of appeal had been filed late. Virginia Supreme Court Rule 5:9(a) provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment.

The Virginia Supreme Court did not act immediately on the Commonwealth's motion, and both parties filed several briefs on the subject of the motion to dismiss and on the merits of the claims in Coleman's petition. On May 19, 1987, the Virginia Supreme Court issued the following order, dismissing Coleman's appeal:

> "On December 4, 1986 came the appellant, by counsel, and filed a petition for appeal in the above-styled case.
>
> "Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee

filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

"Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." App. 25–26.

This Court again denied certiorari. *Coleman* v. *Bass*, 484 U. S. 918 (1987).

Coleman next filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia. In his petition, Coleman presented four federal constitutional claims he had raised on direct appeal in the Virginia Supreme Court and seven claims he had raised for the first time in state habeas. The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims. App. 38–39. The District Court nonetheless went on to address the merits of all 11 of Coleman's claims. The court ruled against Coleman on all of the claims and denied the petition. *Id.*, at 40–52.

The United States Court of Appeals for the Fourth Circuit affirmed. 895 F. 2d 139 (1990). The court held that Coleman had defaulted all of the claims that he had presented for the first time in state habeas. Coleman argued that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, and therefore the federal courts could not treat it as such under the rule of *Harris* v. *Reed*, 489 U. S. 255 (1989). The Fourth Circuit disagreed. It concluded that the Virginia Supreme Court had met the "plain statement" requirement of *Harris* by granting a motion to dismiss that was based solely on procedural grounds. 895 F. 2d, at 143. The Fourth Circuit held that the Virginia Supreme Court's deci-

sion rested on independent and adequate state grounds and that Coleman had not shown cause to excuse the default. *Id.*, at 143–144. As a consequence, federal review of the claims Coleman presented only in the state habeas proceeding was barred. *Id.*, at 144. We granted certiorari, 498 U. S. 937 (1990), to resolve several issues concerning the relationship between state procedural defaults and federal habeas review, and now affirm.

II

A

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *e. g.*, *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1872). This rule applies whether the state law ground is substantive or procedural. See, *e. g.*, *Fox Film*, *supra*; *Herndon* v. *Georgia*, 295 U. S. 441 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. See *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when

a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds. See *Wainwright* v. *Sykes*, 433 U. S. 72, 81, 87 (1977); *Ulster County Court* v. *Allen*, 442 U. S. 140, 148 (1979). See generally *Harris*, *supra*, at 262.

The basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court. When this Court reviews a state court decision on direct review pursuant to 28 U. S. C. § 1257, it is reviewing the *judgment;* if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do. This is not the case in habeas. When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U. S. C. § 2254, it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." *Ibid.* The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*. See *Fay* v. *Noia*, 372 U. S. 391, 430 (1963).

Nonetheless, a state prisoner is in custody *pursuant* to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. See *id.*, at 469 (Harlan, J., dissenting). In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and ade-

quate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

When the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play. This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. See *Ex parte Royall*, 117 U. S. 241 (1886). See also *Rose* v. *Lundy*, 455 U. S. 509 (1982); *Castille* v. *Peoples*, 489 U. S. 346 (1989); 28 U. S. C. §2254(b) (codifying the rule). This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in *Rose*, *supra:*

> "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 490–491 (1973). Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' *Ex parte Royall*, 117 U. S., at 251. Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' *Darr* v. *Burford*, 339 U. S. 200, 204 (1950)." *Id.*, at 518.

These same concerns apply to federal claims that have been procedurally defaulted in state court. Just as in those

cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. See 28 U. S. C. § 2254(b); *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982). In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

B

It is not always easy for a federal court to apply the independent and adequate state ground doctrine. State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly. In such cases, it is often difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference. In other cases, state opinions purporting to apply state constitutional law will derive principles by reference to federal constitutional decisions from this Court. Again, it is unclear from such opinions whether the state law decision is independent of federal law.

In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we provided a partial solution to this problem in the form of a conclusive presumption. Prior to *Long*, when faced with ambiguous state court decisions, this Court had adopted various inconsistent and unsatisfactory solutions including dismissal of the case, remand to the state court for clarification, or an independent investigation of state law. *Id.*, at 1038–1040. These solutions were burdensome both to this Court and to

the state courts. They were also largely unnecessary in those cases where it fairly appeared that the state court decision rested primarily on federal law. The most reasonable conclusion in such cases is that there is not an independent and adequate state ground for the decision. Therefore, in order to minimize the costs associated with resolving ambiguities in state court decisions while still fulfilling our obligation to determine if there was an independent and adequate state ground for the decision, we established a conclusive presumption of jurisdiction in these cases:

> "[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040–1041.

After *Long*, a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating "clearly and expressly that [its decision] is . . . based on bona fide separate, adequate, and independent grounds." *Id.*, at 1041.

In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), we applied the *Long* presumption in the context of an alleged independent and adequate state procedural ground. Caldwell, a criminal defendant, challenged at trial part of the prosecutor's closing argument to the jury, but he did not raise the issue on appeal to the Mississippi Supreme Court. That court raised the issue *sua sponte*, discussing this federal question at length in its opinion and deciding it against Caldwell. The court also made reference to its general rule that issues not raised on appeal are deemed waived. The State argued to this Court that the procedural default constituted an independent and adequate state ground for the Mississippi

court's decision. We rejected this argument, noting that the state decision "'fairly appears to rest primarily on federal law,'" and there was no clear and express statement that the Mississippi Supreme Court was relying on procedural default as an independent ground. *Id.*, at 327, quoting *Long*, *supra*, at 1040.

Long and *Caldwell* were direct review cases. We first considered the problem of ambiguous state court decisions in the application of the independent and adequate state ground doctrine in a federal habeas case in *Harris* v. *Reed*, 489 U. S. 255 (1989). Harris, a state prisoner, filed a petition for state postconviction relief, alleging that his trial counsel had rendered ineffective assistance. The state trial court dismissed the petition, and the Appellate Court of Illinois affirmed. In its order, the Appellate Court referred to the Illinois rule that "'those [issues] which could have been presented [on direct appeal], but were not, are considered waived.'" *Id.*, at 258. The court concluded that Harris could have raised his ineffective assistance claims on direct review. Nonetheless, the court considered and rejected Harris' claims on the merits. Harris then petitioned for federal habeas.

The situation presented to this Court was nearly identical to that in *Long* and *Caldwell:* a state court decision that fairly appeared to rest primarily on federal law in a context in which a federal court has an obligation to determine if the state court decision rested on an independent and adequate state ground. "Faced with a common problem, we adopt[ed] a common solution." *Harris*, *supra*, at 263. *Harris* applied in federal habeas the presumption this Court adopted in *Long* for direct review cases. Because the Illinois Appellate Court did not "clearly and expressly" rely on waiver as a ground for rejecting Harris' ineffective assistance of counsel claims, the *Long* presumption applied and Harris was not barred from federal habeas. *Harris*, *supra*, at 266.

After *Harris*, federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state

court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Long*, *supra*, at 1040–1041. In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.*

III

A

Coleman contends that the presumption of *Long* and *Harris* applies in this case and precludes a bar to habeas because the Virginia Supreme Court's order dismissing Coleman's appeal did not "clearly and expressly" state that it was based on state procedural grounds. Coleman reads *Harris* too broadly. A predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law.

Coleman relies on other language in *Harris*. That opinion announces that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case

*This rule does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims. See *Harris* v. *Reed*, 489 U. S. 255, 269–270 (1989) (O'CONNOR, J., concurring); *Teague* v. *Lane*, 489 U. S. 288, 297–298 (1989).

clearly and expressly states that its judgment rests on a state procedural bar." *Harris*, *supra*, at 263 (internal quotation marks omitted). Coleman contends that this rule, by its terms, applies to all state court judgments, not just those that fairly appear to rest primarily on federal law.

Coleman has read the rule out of context. It is unmistakably clear that *Harris* applies the same presumption in habeas that *Long* and *Caldwell* adopted in direct review cases in this Court. See *Harris*, 489 U. S., at 263 ("Faced with a common problem we adopt a common solution"); see also *id.*, at 264 ("Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review"). Indeed, the quoted passage purports to state the rule "on either direct or habeas review." *Harris*, being a federal habeas case, could not change the rule for direct review; the reference to both direct and habeas review makes plain that *Harris* applies precisely the same rule as *Long*. *Harris* describes the *Long* presumption, and hence its own, as applying only in those cases in which "'it fairly appears that the state court rested its decision primarily on federal law.'" *Harris*, *supra*, at 261, quoting *Long*, 463 U. S., at 1040. That in one particular exposition of its rule *Harris* does not mention the predicate to application of the presumption does not change the holding of the opinion.

Coleman urges a broader rule: that the presumption applies in all cases in which a habeas petitioner presented his federal claims to the state court. This rule makes little sense. In direct review cases, "[i]t is . . . 'incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the [state court] judgment.'" *Long*, *supra*, at 1038, quoting *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931). Similarly, federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds. In cases in which the *Long* and *Harris* presump-

tion applies, federal courts will conclude that the relevant state court judgment does not rest on an independent and adequate state ground. The presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases. As we explained in a different context:

> "*Per se* rules . . . require the Court to make broad generalizations . . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977).

Per se rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time. The *Long* and *Harris* presumption works because in the majority of cases in which a state court decision fairly appears to rest primarily on federal law or to be interwoven with such law, and the state court does not plainly state that it is relying on an independent and adequate state ground, the state court decision did not in fact rest on an independent and adequate state ground. We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.

The tradeoff is very different when the factual predicate does not exist. In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the "most reasonable explanation" is that the state judgment rested on federal grounds. Cf. *Long*, *supra*, at 1041. Yet Coleman would have the federal courts apply a conclusive presumption of no independent and adequate state grounds in every case in which a state prisoner presented his federal claims to a state

court, regardless of whether it fairly appears that the state court addressed those claims. We cannot accept such a rule, for it would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. Any efficiency gained by applying a conclusive presumption, and thereby avoiding inquiry into state law, is simply not worth the cost in the loss of respect for the State that such a rule would entail.

It may be argued that a broadly applicable presumption is not counterfactual after it is announced: Once state courts know that their decisions resting on independent and adequate state procedural grounds will be honored in federal habeas only if there is a clear and express statement of the default, these courts will provide such a statement in all relevant cases. This argument does not help Coleman. Even assuming that *Harris* can be read as establishing a presumption in all cases, the Virginia Supreme Court issued its order dismissing Coleman's appeal *before* this Court decided *Harris*. As to this state court order, the absence of an express statement of procedural default is not very informative.

In any event, we decline to establish such a rule here, for it would place burdens on the States and state courts in exchange for very little benefit to the federal courts. We are, as an initial matter, far from confident that the empirical assumption of the argument for such a rule is correct. It is not necessarily the case that state courts will take pains to provide a clear and express statement of procedural default in all cases, even after announcement of the rule. State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in

terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction. If a state court, in the course of disposing of cases on its overcrowded docket, neglects to provide a clear and express statement of procedural default, or is insufficiently motivated to do so, there is little the State can do about it. Yet it is primarily respect for the State's interests that underlies the application of the independent and adequate state ground doctrine in federal habeas.

A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case.

Nor do we believe that the federal courts will save much work by applying the *Harris* presumption in all cases. The presumption at present applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. In the rest of the cases, there is little need for a conclusive presumption. In the absence of a clear indication

that a state court rested its decision on federal law, a federal court's task will not be difficult.

There is, in sum, little that the federal courts will gain by applying a presumption of federal review in those cases where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, and much that the States and state courts will lose. We decline to so expand the *Harris* presumption.

B

The *Harris* presumption does not apply here. Coleman does not argue, nor could he, that it "fairly appears" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal. That motion was based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

Coleman concedes that the Virginia Supreme Court dismissed his state habeas appeal as untimely, applying a state procedural rule. Brief for Petitioner 9. He argues instead that the court's application of this procedural rule was not independent of federal law.

Virginia Supreme Court Rule 5:5(a) declares that the 30-day requirement for filing a notice of appeal is "mandatory." The Virginia Supreme Court has reiterated the unwaivable nature of this requirement. See *School Bd. of Lynchburg* v. *Scott*, 237 Va. 550, 556, 379 S. E. 2d 319, 323 (1989); *Vaughn* v. *Vaughn*, 215 Va. 328, 329, 210 S. E. 2d 140, 142 (1974); *Mears* v. *Mears*, 206 Va. 444, 445, 143 S. E. 2d 889, 890 (1965). Despite these forthright pronouncements, Coleman contends that in this case the Virginia Supreme Court did not automatically apply its time requirement. Rather, Coleman

asserts, the court first considered the merits of his federal claims and applied the procedural bar only after determining that doing so would not abridge one of Coleman's constitutional rights. In *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), this Court held that a similar Oklahoma rule, excusing procedural default in cases of "fundamental trial error," was not independent of federal law so as to bar direct review because "the State ha[d] made application of the procedural bar depend on an antecedent ruling on federal law." *Id.*, at 75. For the same reason, Coleman argues, the Virginia Supreme Court's time requirement is not independent of federal law.

Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if *Ake* applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.

Coleman cites *Tharp* v. *Commonwealth*, 211 Va. 1, 175 S. E. 2d 277 (1970). In that case, the Virginia Supreme Court announced that it was ending its practice of allowing extensions of time for petitions of writs of error in criminal and state habeas cases:

> "Henceforth we will extend the time for filing a petition for a writ of error only if it is found that to deny the extension would abridge a constitutional right." *Id.*, at 3, 175 S. E. 2d, at 278.

Coleman contends that the Virginia Supreme Court's exception for constitutional claims demonstrates that the court will conduct at least a cursory review of a petitioner's constitutional claims on the merits before dismissing an appeal.

We are not convinced that *Tharp* stands for the rule that Coleman believes it does. Coleman reads that case as establishing a practice in the Virginia Supreme Court of examining the merits of all underlying constitutional claims before denying a petition for appeal or writ of error as time barred. A more natural reading is that the Virginia Supreme Court will only grant an extension of time if *the denial itself* would

abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard.

This was the case, for example, in *Cabaniss* v. *Cunningham*, 206 Va. 330, 143 S. E. 2d 911 (1965). Cabaniss had defaulted the direct appeal of his criminal conviction because the trial court had failed to honor his request for appointed counsel on appeal, a request the court was required to honor under the Constitution. See *Douglas* v. *California*, 372 U. S. 353 (1963). The Virginia Supreme Court, on state collateral review, ordered that Cabaniss be given counsel and allowed to file a new appeal, although grossly out of time. 206 Va., at 335, 143 S. E. 2d, at 914. Enforcing the time requirements for appeal in that case would have abridged Cabaniss' constitutional right to counsel on appeal. See also *Thacker* v. *Peyton*, 206 Va. 771, 146 S. E. 2d 176 (1966) (same); *Stokes* v. *Peyton*, 207 Va. 1, 147 S. E. 2d 773 (1966) (same). Such a rule would be of no help to Coleman. He does not contend that the failure of the Virginia Supreme Court to hear his untimely state habeas appeal violated one of his constitutional rights.

Even if we accept Coleman's reading of *Tharp*, however, it is clear that the Virginia Supreme Court did not apply the *Tharp* rule here. *Tharp* concerns the filing requirement for *petitions*. Here, it was not Coleman's petition for appeal that was late, but his *notice* of appeal. A petition for appeal to the Virginia Supreme Court is a document filed with that court in which the petitioner describes the alleged errors in the decision below. Va. Sup. Ct. Rule 5:17(c). It need only be filed within three months of the final judgment of a trial court. Rule 5:17(a)(1). By contrast, the notice of appeal is a document filed *with the trial court* that notifies that court and the Virginia Supreme Court, as well as the parties, that there will be an appeal; it is a purely ministerial document. Rule 5:9. The notice of the appeal must be filed within 30

days of the final judgment of the trial court. *Ibid.* Coleman has cited no authority indicating that the Virginia Supreme Court has recognized an exception to the time requirement for filing a notice of appeal.

Coleman cites also *O'Brien* v. *Socony Mobil Oil Co.*, 207 Va. 707, 152 S. E. 2d 278 (1967). In that case, O'Brien, a civil litigant making a constitutional property rights claim, filed her notice of appeal several years late. She relied on three recent Virginia Supreme Court cases for the proposition that the court would waive the time requirement for notice of appeal where constitutional rights were at stake. See *Cabaniss*, *supra; Thacker*, *supra; Stokes*, *supra.* As noted, those were state habeas cases in which the Virginia Supreme Court determined that the petitioner had been denied direct appeal because of a constitutional error in failure to appoint counsel.

In *O'Brien*, the Virginia Supreme Court expressly reserved the "question whether the precedent of the *Cabaniss*, *Thacker* and *Stokes* cases should be followed in cases involving denial of constitutional property rights." 207 Va., at 715, 152 S. E. 2d, at 284. The court then addressed O'Brien's constitutional claim on the merits and ruled against her. As a result, there was no need to decide if she should be allowed an exception to the "mandatory" time requirement, *id.*, at 709, 152 S. E. 2d, at 280, and her appeal was dismissed as untimely.

Coleman argues that *O'Brien* demonstrates that the Virginia Supreme Court will review the merits of constitutional claims before deciding whether to dismiss an appeal as untimely. The court in *O'Brien* did conduct such a review, but the court also explicitly declined to announce a rule that there is a constitutional exception to the time requirement for filing a notice of appeal. There is no evidence other than *O'Brien* that the Virginia Supreme Court has ever conducted such a review, and *O'Brien* explicitly declined to announce such a

practice. We decline Coleman's invitation to announce such a practice for that court.

Finally, Coleman argues that the Virginia Supreme Court's dismissal order in this case is at least ambiguous because it was issued "[u]pon consideration" of all the filed papers, including Coleman's petition for appeal and the Commonwealth's brief in opposition, both of which discussed the merits of Coleman's federal claims. There is no doubt that the Virginia Supreme Court's "consideration" of all filed papers adds some ambiguity, but we simply cannot read it as overriding the court's explicit grant of a dismissal motion based solely on procedural grounds. Those grounds are independent of federal law.

Coleman contends also that the procedural bar was not adequate to support the judgment. Coleman did not petition for certiorari on this question, and we therefore accept the Court of Appeals' conclusion that the bar was adequate. See 895 F. 2d, at 143.

IV

In *Daniels* v. *Allen*, the companion case to *Brown* v. *Allen*, 344 U. S. 443 (1953), we confronted a situation nearly identical to that here. Petitioners were convicted in a North Carolina trial court and then were one day late in filing their appeal as of right in the North Carolina Supreme Court. That court rejected the appeals as procedurally barred. We held that federal habeas was also barred unless petitioners could prove that they were "detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials." *Id.*, at 485–486.

Fay v. *Noia*, 372 U. S. 391 (1963), overruled this holding. Noia failed to appeal at all in state court his state conviction, and then sought federal habeas review of his claim that his confession had been coerced. This Court held that such a procedural default in state court does not bar federal habeas review unless the petitioner has deliberately bypassed state procedures by intentionally forgoing an opportunity for state

review. *Id.*, at 438–439. *Fay* thus created a presumption in favor of federal habeas review of claims procedurally defaulted in state court. The Court based this holding on its conclusion that a State's interest in orderly procedure is sufficiently vindicated by the prisoner's forfeiture of his state remedies. "Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy . . . of affording an effective remedy for restraints contrary to the Constitution." *Id.*, at 433–434.

Our cases after *Fay* that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules. *Francis* v. *Henderson*, 425 U. S. 536 (1976), involved a Louisiana prisoner challenging in federal habeas the composition of the grand jury that had indicted him. Louisiana law provided that any such challenge must be made in advance of trial or it would be deemed waived. Because Francis had not raised a timely objection, the Louisiana courts refused to hear his claim. In deciding whether this state procedural default would also bar review in federal habeas, we looked to our decision in *Davis* v. *United States*, 411 U. S. 233 (1973). Davis, a federal prisoner, had defaulted an identical federal claim pursuant to Federal Rule of Criminal Procedure 12(b)(2). We held that a federal court on collateral review could not hear the claim unless Davis could show "cause" for his failure to challenge the composition of the grand jury before trial and actual prejudice as a result of the alleged constitutional violations. *Id.*, at 242–245.

The *Francis* Court noted the important interests served by the pretrial objection requirement of Rule 12(b)(2) and the parallel state rule: the possible avoidance of an unnecessary trial or of a retrial, the difficulty of making factual determinations concerning grand juries long after the indictment has been handed down and the grand jury disbanded, and the potential disruption to numerous convictions of finding a defect

in a grand jury only after the jury has handed down indictments in many cases. *Francis*, *supra*, at 540–541. These concerns led us in *Davis* to enforce Rule 12(b)(2) in collateral review. We concluded in *Francis* that a proper respect for the States required that federal courts give to the state procedural rule the same effect they give to the federal rule:

> "If, as *Davis* held, the federal courts must give effect to these important and legitimate concerns in § 2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions. These considerations require that recognition be given 'to the legitimate interests of both State and National Governments, and . . . [that] the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavor] to do so in ways that will not unduly interfere with the legitimate activities of the States.' *Younger* v. *Harris*, 401 U. S. 37, 44. 'Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.' *Kaufman* v. *United States*, 394 U. S. 217, 228." *Francis*, 425 U. S., at 541–542.

We held that Francis' claim was barred in federal habeas unless he could establish cause and prejudice. *Id.*, at 542.

Wainwright v. *Sykes*, 433 U. S. 72 (1977), applied the cause and prejudice standard more broadly. Sykes did not object at trial to the introduction of certain inculpatory statements he had earlier made to the police. Under Florida law, this failure barred state courts from hearing the claim on either direct appeal or state collateral review. We recognized that this contemporaneous objection rule served strong state interests in the finality of its criminal litigation. *Id.*, at

88–90. To protect these interests, we adopted the same presumption against federal habeas review of claims defaulted in state court for failure to object at trial that *Francis* had adopted in the grand jury context: the cause and prejudice standard. "We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.*, at 90.

In so holding, *Sykes* limited *Fay* to its facts. The cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay*. These incompatible rules are based on very different conceptions of comity and of the importance of finality in state criminal litigation. See Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050, 1053–1059 (1978). In *Sykes*, we left open the question whether the deliberate bypass standard still applied to a situation like that in *Fay*, where a petitioner has surrendered entirely his right to appeal his state conviction. *Sykes*, 433 U. S., at 88, n. 12. We rejected explicitly, however, "the sweeping language of *Fay* v. *Noia*, going far beyond the facts of the case eliciting it." *Id.*, at 87–88.

Our cases since *Sykes* have been unanimous in applying the cause and prejudice standard. *Engle* v. *Isaac*, 456 U. S. 107 (1982), held that the standard applies even in cases in which the alleged constitutional error impaired the truthfinding function of the trial. Respondents had failed to object at trial to jury instructions that placed on them the burden of proving self-defense. Ohio's contemporaneous objection rule barred respondents' claim on appeal that the burden should have been on the State. We held that this independent and adequate state ground barred federal habeas as well, absent a showing of cause and prejudice.

Recognizing that the writ of habeas corpus "is a bulwark against convictions that violate fundamental fairness," we

also acknowledged that "the Great Writ entails significant costs." *Id.*, at 126 (internal quotation marks omitted). The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails:

> "As Justice Harlan once observed, '[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.' *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (dissenting opinion)." *Id.*, at 127.

Moreover, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.*, at 128. These costs are particularly high, we explained, when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court. Because these costs do not depend on the type of claim the prisoner raised, we reaffirmed that a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice. *Id.*, at 129. We also explained in *Engle* that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct "a fundamental miscarriage of justice." *Id.*, at 135. See also *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

In *Carrier*, we applied the cause and prejudice standard to a petitioner's failure to raise a particular claim in his state

court appeal. Again, we emphasized the important interests served by state procedural rules at every stage of the judicial process and the harm to the States that results when federal courts ignore these rules:

> "A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. . . .
>
> ". . . 'Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.' [*Reed* v. *Ross*, 468 U. S. 1, 10 (1984).] . . . Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's ability to enforce its procedural rules.' *Engle*, 456 U. S., at 129." *Id.*, at 490–491.

In *Carrier*, as in *Sykes*, we left open the question whether *Fay*'s deliberate bypass standard continued to apply under the facts of that case, where a state prisoner has defaulted his entire appeal. See *Carrier*, *supra*, at 492; *Sykes*, *supra*, at 88, n. 12. We are now required to answer this question. By filing late, Coleman defaulted his entire state collateral appeal. This was no doubt an inadvertent error, and respondent concedes that Coleman did not "understandingly and knowingly" forgo the privilege of state collateral appeal. See *Fay*, 372 U. S., at 439. Therefore, if the *Fay* deliberate bypass standard still applies, Coleman's state procedural default will not bar federal habeas.

In *Harris*, we described in broad terms the application of the cause and prejudice standard, hinting strongly that *Fay* had been superseded:

> "Under *Sykes* and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause' for the default and 'prejudice

> attributable thereto,' *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986), or demonstrate that failure to consider the federal claim will result in a '"'fundamental miscarriage of justice.'"' *Id.*, at 495, quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). See also *Smith* v. *Murray*, 477 U. S. 527, 537 (1986)." *Harris*, 489 U. S., at 262.

We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. Cf. *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991) ("Though *Fay* v. *Noia*, *supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality").

Carrier applied the cause and prejudice standard to the failure to raise a particular claim on appeal. There is no reason that the same standard should not apply to a failure to appeal at all. All of the State's interests—in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors—are implicated whether a prisoner defaults one claim or all of them. A federal court generally should not interfere in either case. By applying the cause and prejudice standard uniformly to all independent and adequate state procedural

defaults, we eliminate the irrational distinction between *Fay* and the rule of cases like *Francis*, *Sykes*, *Engle*, and *Carrier*.

We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own. This Court has long understood the vital interest served by *federal* procedural rules, even when they serve to bar federal review of constitutional claims. In *Yakus* v. *United States*, 321 U. S. 414 (1944), for example, the Court explained:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Id.*, at 444.

In *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257 (1978), we held that the appeal in a state prisoner federal habeas case was barred because untimely under Federal Rule of Appellate Procedure 4(a). In describing the "mandatory and jurisdictional" nature of the Rule and its justification, we might as well have been describing Virginia Supreme Court Rule 5:5(a):

> "This 30-day time limit is 'mandatory and jurisdictional.' The purpose of the rule is clear: It is 'to set a definite point of time when litigation should be at an end, unless within that time the prescribed application has been made; and if it has not been, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.' *Matton Steamboat* [*Co.* v. *Murphy*, 319 U. S. 412, 415 (1943)]." *Browder*, *supra*, at 264 (citations omitted).

No less respect should be given to state rules of procedure. See *Francis*, 425 U. S., at 541–542.

V

A

Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.

Murray v. *Carrier* considered the circumstances under which attorney error constitutes cause. Carrier argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy: It deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. 477 U. S., at 487. We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, [466 U. S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.*, at 488.

Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state postconviction proceedings. *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987); *Murray* v. *Giarratano*, 492 U. S. 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright* v. *Torna*, 455 U. S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear

the risk of attorney error that results in a procedural default."

Coleman attempts to avoid this reasoning by arguing that *Carrier* does not stand for such a broad proposition. He contends that *Carrier* applies by its terms only in those situations where it is possible to state a claim for ineffective assistance of counsel. Where there is no constitutional right to counsel, Coleman argues, it is enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent Sixth Amendment claim is possible.

This argument is inconsistent not only with the language of *Carrier*, but with the logic of that opinion as well. We explained clearly that "cause" under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him: "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U. S., at 488. For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard." *Ibid.* See also *id.*, at 492 ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").

Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Id.*, at 488. See *Link* v. *Wabash R. Co.*, 370 U. S. 626, 634 (1962) (in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent"); *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 92 (1990) (same). Attor-

ney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that "the lawyer ceases to be an agent of the petitioner." Brief for Petitioner 29. In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule would be contrary to well-settled principles of agency law. See, *e. g.*, Restatement (Second) of Agency § 242 (1958) (master is subject to liability for harm caused by negligent conduct of servant within the scope of employment). Rather, as *Carrier* explains, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." 477 U. S., at 488. In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i. e.*, "imputed to the State." See also *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985) ("The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").

Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.

B

Among the claims Coleman brought in state habeas, and then again in federal habeas, is ineffective assistance of counsel during trial, sentencing, and appeal. Coleman contends that, at least as to these claims, attorney error in state habeas must constitute cause. This is because, under Virginia law at the time of Coleman's trial and direct appeal, ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas. See *Walker* v. *Mitchell*, 224 Va. 568, 571, 299 S. E. 2d 698, 699–700 (1983); *Dowell* v. *Commonwealth*, 3 Va. App. 555, 562, 351 S. E. 2d 915, 919 (1987). Coleman argues that attorney error in failing to file timely in the first forum in which a federal claim can be raised is cause.

We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. *Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel before that court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Douglas v. *California*, 372 U. S. 353 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. *Evitts* v. *Lucey*, *supra*, held that this right encompasses a right to effective assistance of counsel for all criminal defendants in

their first appeal as of right. We based our holding in *Douglas* on that "equality demanded by the Fourteenth Amendment." 372 U. S., at 358. Recognizing that "[a]bsolute equality is not required," we nonetheless held that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.*, at 357 (emphasis in original).

Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from *that* determination. Our case law will not support it.

In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), and *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. We held in *Ross* that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U. S., at 616. Similarly, in *Finley* we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review. 481 U. S., at 556 (citing *Ross*, *supra*).

These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel

to appeal a state collateral determination of his claims of trial error.

Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas. As Coleman does not argue in this Court that federal review of his claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing these claims in federal habeas. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, concurring.

I concur in the judgment of the Court and I join in its opinion, but add a few words concerning what occurred below. *Harris* v. *Reed*, 489 U. S. 255 (1989), stated that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case '"clearly and expressly"' states that its judgment rests on a state procedural bar." *Id.*, at 263, quoting *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985), in turn quoting *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). If there were nothing before us but the order granting the State's motion to dismiss for untimeliness, it would be clear enough that the dismissal was based on a procedural default.

But the state court did not grant the State's explicit request for an early ruling on the motion. Instead, the court delayed ruling on the motion to dismiss, and hence briefs on both the motion and the merits were filed. Six months later, the court "upon consideration whereof" granted the State's motion to dismiss the appeal. Hence petitioner's argument that the court studied the merits of the federal claims to determine whether to waive the procedural default, found those claims lacking, and only then granted the motion to dismiss; it is as though the court had said that it was granting the motion to dismiss the appeal as untimely because the federal

claims were untenable and provided the court no reason to waive the default.

The predicate for this argument is that on occasion the Virginia Supreme Court waives the untimeliness rule. If that were true, the rule would not be an adequate and independent state ground barring direct or habeas review. Cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985). The filing of briefs and their consideration would do no more than buttress the claim that the rule is not strictly enforced.

Petitioner argues that the Virginia court does in fact waive the rule on occasion, but I am not now convinced that there is a practice of waiving the rule when constitutional issues are at stake, even fundamental ones. The evidence is too scanty to permit a conclusion that the rule is no longer an adequate and independent state ground barring federal review. The fact that merits briefs were filed and were considered by the court, without more, does not justify a different conclusion.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests before concluding that the plain-statement rule of *Michigan* v. *Long*, 463 U. S. 1032 (1983), does not apply to a summary order. One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. Nor does the majority even allude to the "important need for uniformity in federal law," *id.*, at 1040, which justified this Court's adoption of the plain-statement rule in the first place. Rather, displaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade

to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

I

The Court cavalierly claims that "[t]his is a case about federalism," *ante*, at 726, and proceeds without explanation to assume that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state-court judgment. Federalism, however, has no inherent normative value: It does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions." Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 442 (1961). See also The Federalist No. 51, p. 324 (C. Rossiter ed. 1961) (J. Madison) ("Justice is the end of government. It is the end of civil society"). In this context, it cannot lightly be assumed that the interests of federalism are fostered by a rule that impedes federal review of federal constitutional claims.

Moreover, the form of federalism embraced by today's majority bears little resemblance to that adopted by the Framers of the Constitution and ratified by the original States. The majority proceeds as if the sovereign interests of the States and the Federal Government were coequal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States. The citizens expressly declared: "This Constitution, and the Laws of the United States

which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U. S. Const., Art. VI, cl. 2. James Madison felt that a constitution without this Clause "would have been evidently and radically defective." The Federalist No. 44, p. 286 (C. Rossiter ed. 1961). The ratification of the Fourteenth Amendment by the citizens of the several States expanded federal powers even further, with a corresponding diminution of state sovereignty. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 453–456 (1976); *Ex parte Virginia*, 100 U. S. 339, 344–348 (1880). Thus, "the sovereignty of the States is limited by the Constitution itself." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 548 (1985).

Federal habeas review of state-court judgments, respectfully employed to safeguard federal rights, is no invasion of state sovereignty. Cf. *Ex parte Virginia*, 100 U. S., at 346. Since 1867, Congress has acted within its constitutional authority to "'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed* v. *Ross*, 468 U. S. 1, 10 (1984), quoting *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). See 28 U. S. C. § 2254. Justice Frankfurter, in his separate opinion in *Brown* v. *Allen*, 344 U. S. 443, 510 (1953), recognized this:

> "Insofar as [federal habeas] jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law."

Thus, the considered exercise by federal courts—in vindication of fundamental constitutional rights—of the habeas jurisdiction conferred on them by Congress exemplifies the full expression of this Nation's federalism.

That the majority has lost sight of the animating principles of federalism is well illustrated by its discussion of the duty of a federal court to determine whether a state-court judgment rests on an adequate and independent state ground. According to the majority's formulation, establishing this duty in the federal court serves to diminish the risk that a federal habeas court will review the federal claims of a prisoner in custody pursuant to a judgment that rests upon an adequate and independent state ground. In reality, however, this duty of a federal court to determine its jurisdiction originally was articulated to ensure that federal rights were not improperly denied a federal forum. Thus, the quote artfully reconstituted by the majority, *ante*, at 736, originally read: "[I]t is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, *in order that constitutional guarantees may appropriately be enforced*, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931) (emphasis added). Similarly, the Court has stated that the duty "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Ward* v. *Board of Comm'rs of Love County*, 253 U. S. 17, 23 (1920). Indeed, the duty arose out of a distinct distrust of state courts, which this Court perceived as attempting to evade federal review. See *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537, 540 (1930) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded").

From these noble beginnings, the Court has managed to transform the duty to protect federal rights into a self-fashioned abdication. Defying the constitutional allocation

of sovereign authority, the Court now requires a federal court to scrutinize the state-court judgment with an eye to denying a litigant review of his federal claims rather than enforcing those provisions of the Federal Bill of Rights that secure individual autonomy.

II

Even if one acquiesced in the majority's unjustifiable elevation of abstract federalism over fundamental precepts of liberty and fairness, the Court's conclusion that the plain-statement rule of *Michigan* v. *Long* does not apply to a summary order defies both settled understandings and compassionate reason.

A

As an initial matter, it cannot seriously be disputed that the Court's opinion in *Harris* v. *Reed*, 489 U. S. 255 (1989), expressly considered this issue and resolved the question quite contrary to the Court's holding today. Both *Long* and *Harris* involved a federal review of a state-court opinion that, on its face, addressed the merits of the underlying claims and resolved those claims with express reference to both state and federal law. See *Long*, 463 U. S., at 1037, and n. 3; *Harris*, 489 U. S., at 257–258. In each case, it was not disputed that the alleged state ground had been invoked: The Court was faced with the question whether that state ground was adequate to support the judgment and independent of federal law. Accordingly, the *Long* and *Harris* Courts spoke of state-court judgments that "fairly appea[r] to rest primarily on federal law, or to be interwoven with federal law," *Long*, 463 U. S., at 1040, or that contained "ambiguous . . . references to state law." *Harris*, 489 U. S., at 263.

The majority asserts that these statements establish a factual predicate for the application of the plain-statement rule. *Ante*, at 735–736. Neither opinion, however, purported to limit the application of the plain-statement rule to the narrow

circumstances presented in the case under review. In fact, the several opinions in *Harris* make plain that for purposes of federal habeas, the Court was adopting the *Long* presumption for all cases where federal claims are presented to state courts.

The *Harris* Court expressed its understanding of *Long* unequivocally: "We held in *Long* that unless the state court clearly expressed its reliance on an adequate and independent state-law ground, this Court may address a federal issue considered by the state court." 489 U. S., at 262–263. Armed with that understanding, the Court concluded that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case '"clearly and expressly"' states that its judgment rests on a state procedural bar." *Id.*, at 263, quoting *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985), in turn quoting *Long*, 463 U. S., at 1041.

JUSTICE O'CONNOR, in a concurring opinion joined by THE CHIEF JUSTICE and JUSTICE SCALIA, echoed the majority's indication that the *Long* presumption applied to all cases where a federal claim is presented to the state courts. She wrote separately to emphasize that the Court's opinion did not alter the well-settled rule that federal courts may look to state procedural-default rules in determining whether a federal claim has been properly exhausted in the state courts. See 489 U. S., at 268–270. "[I]t is simply impossible," according to the concurrence, "to '[r]equir[e] a state court to be explicit in its reliance on a procedural default' . . . where a claim raised on federal habeas has never been presented to the state courts at all." *Id.*, at 270. Certainly, if the Court's opinion had been limited to cases where the state court's judgment fairly appeared to rest on federal law or was interwoven with federal law, the point painstakingly made in this concurrence would have been unnecessary.

That *Harris*' adoption of the plain-statement rule for federal habeas cases was intended to apply to all cases where

federal claims were presented to the state courts is confirmed by the exchange there between the majority and the dissent. In his dissenting opinion, JUSTICE KENNEDY maintained that the Court's formulation of the plain-statement rule would encourage habeas prisoners whose claims would otherwise be procedurally barred to file "a never-ending stream of petitions for postconviction relief" in hope of being "rewarded with a suitably ambiguous rebuff, *perhaps a one-line order finding that a prisoner's claim 'lacks merit' or stating that relief is 'denied.'*" *Id.*, at 282 (emphasis added). The Court responded that "the dissent's fear . . . that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'" *Id.*, at 265, n. 12. The *Harris* Court's holding that the plain-statement rule applies to a summary order could not itself have been more plain. Because the majority acknowledges that the Virginia Supreme Court's dismissal order "adds some ambiguity," *ante*, at 744, *Harris* compels a federal habeas court to provide a forum for the consideration of Coleman's federal claims.

B

Notwithstanding the clarity of the Court's holding in *Harris*, the majority asserts that Coleman has read the rule announced therein "out of context." *Ante*, at 736. I submit, however, that it is the majority that has wrested *Harris* out of the context of a preference for the vindication of fundamental constitutional rights and that has set it down in a vacuum of rhetoric about federalism. In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to

mere utilitarian interests. See, *e. g.*, *McCleskey* v. *Zant*, 499 U. S. 467 (1991). Such unreflective cost-benefit analysis is inconsistent with the very idea of rights. See generally Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L. J. 1035, 1092 (1977). The Bill of Rights is not, after all, a collection of technical interests, and "surely it is an abuse to deal too casually and too lightly with rights guaranteed" therein. *Brown* v. *Allen*, 344 U. S., at 498 (opinion of Frankfurter, J.).

It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review. See *Wainwright* v. *Sykes*, 433 U. S. 72, 82–84 (1977). Rather, the important office of the federal courts in vindicating federal rights gives way to the States' enforcement of their procedural rules to protect the States' interest in being an equal partner in safeguarding federal rights. This accommodation furthers the values underlying federalism in two ways. First, encouraging a defendant to assert his federal rights in the appropriate state forum makes it possible for transgressions to be arrested sooner and before they influence an erroneous deprivation of liberty. Second, thorough examination of a prisoner's federal claims in state court permits more effective review of those claims in federal court, honing the accuracy of the writ as an implement to eradicate unlawful detention. See *Rose* v. *Lundy*, 455 U. S. 509, 519 (1982); *Brown* v. *Allen*, 344 U. S., at 500–501 (opinion of Frankfurter, J.). The majority ignores these purposes in concluding that a State need not bear the burden of making clear its intent to rely on such a rule. When it is uncertain whether a state-court judgment denying relief from federal claims rests on a procedural bar, it is inconsistent with federalism principles for a federal court to exercise discretion to decline to review those federal claims.

In justifying its new rule, the majority first announces that, as a practical matter, the application of the *Long* presumption to a summary order entered in a case where a state

prisoner presented federal constitutional claims to a state court is unwarranted, because "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Ante*, at 737, quoting *Long*, 463 U. S., at 1041. The majority provides no support for this flat assertion. In fact, the assertion finds no support in reality. "Under our federal system, the federal and state 'courts [are] equally bound to guard and protect the rights secured by the Constitution.'" *Rose* v. *Lundy*, 455 U. S., at 518, quoting *Ex parte Royall*, 117 U. S. 241, 251 (1886). Accordingly, state prisoners are required to present their federal claims to state tribunals before proceeding to federal habeas, "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." 455 U. S., at 518. See 28 U. S. C. § 2254. Respect for the States' responsible assumption of this solemn trust compels the conclusion that state courts presented with federal constitutional claims actually resolve those claims unless they indicate to the contrary. Cf. *Brown* v. *Allen*, 344 U. S., at 512 (opinion of Frankfurter, J.) ("[The availability of the writ of habeas corpus] does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed").

The majority claims that applying the plain-statement rule to summary orders "would place burdens on the States and state courts," *ante*, at 738, suggesting that these burdens are borne independently by the States and their courts. The State, according to the majority, "pays the price" for federal review of state prisoner claims "in terms of the uncertainty and delay" as well as in the cost of a retrial. *Id.*, at 738–739. The majority is less clear about the precise contours of the burden this rule is said to place on state courts, merely asserting that it "would also put too great a burden on the state courts." *Ante*, at 739.

The majority's attempt to distinguish between the interests of state courts and the interests of the States in this

context is inexplicable. States do not exist independent of their officers, agents, and citizens. Rather, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, *ante*, at 460. See also *Ex parte Virginia*, 100 U. S., at 347 ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way"). The majority's novel conception of dichotomous interests is entirely unprecedented. See *ibid.* ("[H]e [who] acts in the name and for the State, and is clothed with the State's power, his act is that of the State"). Moreover, it admits of no readily apparent limiting principle. For instance, should a federal habeas court decline to review claims that the state judge committed constitutional error at trial simply because the costs of a retrial will be borne by the State? After all, as the majority asserts, "there is little the State can do about" constitutional errors made by its trial judges. *Ante*, at 739.

Even if the majority correctly attributed the relevant state interests, they are, nonetheless, misconceived. The majority appears most concerned with the financial burden that a retrial places on the States. Of course, if the initial trial conformed to the mandate of the Federal Constitution, not even the most probing federal review would necessitate a retrial. Thus, to the extent the State must "pay the price" of retrying a state prisoner, that price is incurred as a direct result of the State's failure scrupulously to honor his federal rights, not as a consequence of unwelcome federal review. See *Teague* v. *Lane*, 489 U. S. 288, 306 (1989) (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., quoting *Desist* v. *United States*, 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting)) ("'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards'").

The majority also contends without elaboration that a "broad presumption [of federal jurisdiction] would . . . put too great a burden on the state courts." *Ante*, at 739. This assertion not only finds no support in *Long*, where the burden of the presumption on state courts is not even mentioned, but also is premised on the misconception that the plain-statement rule serves only to relieve the federal court of the "bother" of determining the basis of the relevant state-court judgment. Viewed responsibly, the plain-statement rule provides a simple mechanism by which a state court may invoke the discretionary deference of the federal habeas court and virtually insulate its judgment from federal review. While state courts may choose to draw their orders as they wish, the right of a state prisoner, particularly one sentenced to death, to have his federal claim heard by a federal habeas court is simply too fundamental to yield to the State's incidental interest in issuing ambiguous summary orders.

C

Not only is the majority's abandonment of the plain-statement rule for purposes of summary orders unjustified, it is also misguided. In *Long*, the Court adopted the plain-statement rule because we had "announced a number of principles in order to help us determine" whether ambiguous state-court judgments rested on adequate and independent state grounds, but had "not developed a satisfying and consistent approach for resolving this vexing issue." 463 U. S., at 1038. Recognizing that "[t]his ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is *required* when sensitive issues of federal-state relations are involved," *id.*, at 1039 (emphasis added), the Court determined that a broad presumption of federal jurisdiction combined with a simple mechanism by which state courts could clarify their intent to rely on state grounds would best "provide state judges with a clearer opportunity to develop state

jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law," *id.*, at 1041. Today's decision needlessly resurrects the piecemeal approach eschewed by *Long* and, as a consequence, invites the intrusive and unsatisfactory federal inquiry into unfamiliar state law that *Long* sought to avoid.

The Court's decisions in this case and in *Ylst* v. *Nunnemaker*, *post*, p. 797, well reveal the illogic of the ad hoc approach. In this case, to determine whether the admittedly ambiguous state-court judgment rests on an adequate and independent state ground, the Court looks to the "nature of the disposition" and the "surrounding circumstances" that "indicat[e]" that the basis [of the decision] was procedural default. *Ylst*, *post*, at 802. This method of searching for "clues" to the meaning of a facially ambiguous order is inherently indeterminate. Tellingly, both the majority and concurring opinions in this case concede that it remains uncertain whether the state court relied on a procedural default. See *ante*, at 744 ("There is no doubt that the Virginia Supreme Court's 'consideration' of all filed papers adds some ambiguity"); *ante*, at 757–758 (WHITE, J., concurring) ("[I]t is as though the court had said that it was granting the motion to dismiss the appeal as untimely because the federal claims were untenable and provided the court no reason to waive the default"). The plain-statement rule effectively and equitably eliminates this unacceptable uncertainty. I cannot condone the abandonment of such a rule when the result is to foreclose federal habeas review of federal claims based on conjecture as to the "meaning" of an unexplained order.

The Court's decision in *Ylst* demonstrates that we are destined to relive the period where we struggled to develop principles to guide the interpretation of ambiguous state-court orders. In *Ylst*, the last state court to render a judgment on Nunnemaker's federal claims was the California Supreme Court. Nunnemaker had filed a petition for habeas corpus in that court, invoking its original jurisdiction. Accordingly,

the court was not sitting to review the judgment of another state court, but to entertain, as an original matter, Nunnemaker's collateral challenge to his conviction. The court's order denying relief was rendered without explanation or citation. Rejecting the methodology employed just today by the *Coleman* majority, the *Ylst* Court does not look to the pleadings filed in the original action to determine the "meaning" of the unexplained order. Rather, the Court adopts a broad *per se* presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, *post*, at 803. This presumption does not purport to distinguish between unexplained judgments that are entered on review of the reasoned opinion and those that are independent thereof.

The *Ylst* Court demonstrates the employment of the presumption by simply ignoring the judgment of the highest court of California, and by looking back to an intermediate court judgment rendered 12 years earlier to conclude that Nunnemaker's federal claims have been procedurally defaulted. In so concluding, the Court determines that an intervening order by the California Supreme Court, which, with citations to two state-court decisions, denied Nunnemaker's earlier petition invoking the court's original jurisdiction, is not "informative with respect to the question," *post*, at 805, whether a state court has considered the merits of Nunnemaker's claims since the procedural default was recognized. Thus, the Court dismisses two determinations of the California Supreme Court, rendered not in review of an earlier state-court judgment but as an exercise of its original jurisdiction, because it finds those determinations not "informative." While the Court may comfort itself by labeling this exercise "look[ing] through," see *post*, at 804, it cannot be disputed that the practice represents disrespect for the State's determination of how best to structure its mechanisms for seeking postconviction relief.

Moreover, the presumption adopted by the *Ylst* Court further complicates the efforts of state courts to understand and accommodate this Court's federal habeas jurisprudence. Under *Long*, a state court need only recognize that it must clearly express its intent to rely on a state procedural default in order to preclude federal habeas review in most cases. After today, however, a state court that does not intend to rely on a procedural default but wishes to deny a meritless petition in a summary order must now remember that its unexplained order will be ignored by the federal habeas court. Thus, the state court must review the procedural history of the petitioner's claim and determine which state-court judgment a federal habeas court is likely to recognize. It then must determine whether that judgment expresses the substance that the court wishes to convey in its summary order, and react accordingly. If the previous reasoned judgment rests on a procedural default, and the subsequent court wishes to forgive that default, it now must clearly and expressly indicate that its judgment *does not* rest on a state procedural default. I see no benefit in abandoning a clear rule to create chaos.

III

Having abandoned the plain-statement rule with respect to a summary order, the majority must consider Coleman's argument that the untimely filing of his notice of appeal was the result of attorney error of sufficient magnitude as to constitute cause for his procedural default. In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors—even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court—because this attribution of risk represents the appropriate "allocation of costs." *Ante*, at 754. Whether unprofessional attorney conduct in a state postconviction proceeding should bar federal habeas review of a state prisoner's

conviction and sentence of death is not a question of *costs* to be allocated most efficiently. It is, rather, another circumstance where this Court must determine whether federal rights should yield to state interests. In my view, the obligation of a federal habeas court to correct fundamental constitutional violations, particularly in capital cases, should not accede to the State's "discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania* v. *Finley*, 481 U. S. 551, 559 (1987).

The majority first contends that this Court's decision in *Murray* v. *Carrier*, 477 U. S. 478 (1986), expressly resolves this issue. Of course, that cannot be so, as the procedural default at issue in *Murray* occurred on direct review, not collateral attack, and this Court has no authority to resolve issues not before it. Moreover, notwithstanding the majority's protestations to the contrary, the language of *Murray* strongly suggests that the Court's resolution of the issue would have been the same regardless of when the procedural default occurred. The Court in *Murray* explained: "A State's procedural rules serve vital purposes at trial, on appeal, and *on state collateral attack*." 477 U. S., at 490 (emphasis added). Rejecting Carrier's argument that, with respect to the standard for cause, procedural defaults on appeal should be treated differently from those that occur during the trial, the Court stated that "the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at *each successive stage of the judicial process*." *Id.*, at 491 (emphasis added).

The rule foreshadowed by this language, which the majority today evades, most faithfully adheres to a principled view of the role of federal habeas jurisdiction. As noted above, federal courts forgo the exercise of their habeas jurisprudence over claims that are procedurally barred out of respect for the state interests served by those rules. Recognition of

state procedural forfeitures discourages petitioners from attempting to avoid state proceedings and accommodates the State's interest in finality. No rule, however, can deter gross incompetence. To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

The majority's conclusion that Coleman's allegations of ineffective assistance of counsel, if true, would not excuse a procedural default that occurred in the state postconviction proceeding is particularly disturbing because, at the time of Coleman's appeal, state law precluded defendants from raising certain claims on direct appeal. As the majority acknowledges, under state law as it existed at the time of Coleman's trial and appeal, Coleman could raise his ineffective-assistance-of-counsel claim with respect to counsel's conduct during trial and appeal only in state habeas. *Ante*, at 755. This Court has made clear that the Fourteenth Amendment obligates a State "'to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process,'" *Pennsylvania* v. *Finley*, 481 U. S., at 556, quoting *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974), and "require[s] that the state appellate system be 'free from unreasoned distinctions,'" *id.*, at 612. While the State may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the Fourteenth Amendment, structure it in such a way as to deny indigent defendants meaningful access. Accordingly, if a State desires to remove from the process of direct appellate review a claim or category of claims, the Fourteenth Amendment binds the State to ensure that the defendant has effective assistance of counsel for the entirety of the procedure

where the removed claims may be raised. Similarly, fundamental fairness dictates that the State, having removed certain claims from the process of direct review, bear the burden of ineffective assistance of counsel in the proceeding to which the claim has been removed.

Ultimately, the Court's determination that ineffective assistance of counsel cannot constitute cause of a procedural default in a state postconviction proceeding is patently unfair. In concluding that it was not inequitable to apply the cause and prejudice standard to procedural defaults that occur on appeal, the *Murray* Court took comfort in the "additional safeguard against miscarriages of justice in criminal cases": the right to effective assistance of counsel. 477 U. S., at 496. The Court reasoned: "The presence of such a safeguard may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims." *Ibid.*, quoting *Reed* v. *Ross*, 468 U. S., at 9. "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984). It is the quintessence of inequity that the Court today abandons that safeguard while continuing to embrace the cause and prejudice standard.

I dissent.

Syllabus

BLATCHFORD, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS OF ALASKA *v.* NATIVE VILLAGE OF NOATAK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-1782. Argued February 19, 1991—Decided June 24, 1991

Respondents, Alaska Native villages, brought suit against petitioner, a state official, seeking an order requiring payment to them of money allegedly owed under a state revenue-sharing statute. The District Court dismissed the suit as violating the Eleventh Amendment. The Court of Appeals reversed, first on the ground that 28 U. S. C. § 1362 constituted a congressional abrogation of Eleventh Amendment immunity, and then, upon reconsideration, on the ground that Alaska had no immunity against suits by Indian tribes.

Held:

1. The Eleventh Amendment bars suits by Indian tribes against States without their consent. Respondents' argument that traditional principles of sovereign immunity restrict suits only by individuals, and not by other sovereigns, was rejected in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322-323. Nor is there merit to respondents' contention that the States consented to suits by tribes in the "plan of the convention." See *ibid.* Just as in *Monaco* with regard to foreign sovereigns, see *id.*, at 330, there is no compelling evidence that the Founders thought that the States waived their immunity with regard to tribes when they adopted the Constitution. Although tribes are in some respects more like States—which may sue each other, *South Dakota* v. *North Carolina*, 192 U. S. 286, 318—than like foreign sovereigns, it is the mutuality of concession that makes the States' surrender of immunity from suits by sister States plausible. There is no such mutuality with tribes, which have been held repeatedly to enjoy immunity against suits by States. *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505, 509. Pp. 779-782.

2. Section 1362—which grants district courts original jurisdiction to hear "all civil actions, brought by any Indian tribe . . . , wherein the matter in controversy arises under" federal law—does not operate to void the Eleventh Amendment's bar of tribes' suits against States. Pp. 782-788.

(a) Assuming the doubtful proposition that the Federal Government's exemption from state sovereign immunity can be delegated, § 1362 does not embody a general delegation to tribes of the Federal Government's authority, under *United States* v. *Minnesota*, 270 U. S. 181, 195, to sue States on the tribes' behalf. Although *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463—which held that § 1362 revoked as to tribes the Tax Injunction Act's denial of federal-court access to persons other than the United States seeking injunctive relief from state taxation—equated tribal access to federal court with the United States' access, it did not purport to do so generally, nor on the basis of a "delegation" theory, nor with respect to constitutional (as opposed to merely statutory) constraints. Pp. 783–786.

(b) Nor does § 1362 abrogate Eleventh Amendment immunity. It does not satisfy the standard for congressional abrogation set forth in *Dellmuth* v. *Muth*, 491 U. S. 223, 227–228, since it does not reflect an "unmistakably clear" intent to abrogate immunity, made plain "in the language of the statute." Nor was it a sufficiently clear statement under the less stringent standard of *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184, which case (unlike *Dellmuth*) had already been decided at the time of § 1362's enactment in 1966. That case neither mentioned nor was premised on abrogation (as opposed to consensual waiver)—and indeed the Court did not even acknowledge the possibility of congressional abrogation until 1976, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445. Pp. 786–788.

3. Respondents' argument that the Eleventh Amendment does not bar their claim for injunctive relief must be considered initially by the Court of Appeals on remand. P. 788.

896 F. 2d 1157, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 788.

Rex E. Lee argued the cause for petitioner. On the briefs were *Charles E. Cole*, Attorney General of Alaska, *Douglas B. Bailey*, former Attorney General, and *Gary I. Amendola*, *Douglas K. Mertz*, *Jack B. McGee*, and *William F. Cummings*, Assistant Attorneys General.

Lawrence A. Aschenbrenner argued the cause for respondents. With him on the brief for respondent Native Village of Noatak were *Robert T. Anderson*, *William E. Caldwell*, *Carol H. Daniel*, and *Ralph W. Johnson*. *Michael J. Walleri* and *Alicemary L. Closuit* filed a brief for respondent Circle Village.*

JUSTICE SCALIA delivered the opinion of the Court.

We are asked once again to mark the boundaries of state sovereign immunity from suit in federal court. The Court of Appeals for the Ninth Circuit found that immunity did not extend to suits by Indian tribes, and Alaska seeks review of that determination.

I

In 1980, Alaska enacted a revenue-sharing statute that provided annual payments of $25,000 to each "Native village government" located in a community without a state-chartered

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Donald J. Hanaway*, Attorney General of Wisconsin, and *Charles D. Hoornstra*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *Duane Woodard* of Colorado, *Clarine Nardi Riddle* of Connecticut, *Robert A. Butterworth* of Florida, *Warren Price III* of Hawaii, *Jim Jones* of Idaho, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike C. Moore* of Mississippi, *Marc Racicot* of Montana, *Robert M. Spire* of Nebraska, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Nicholas J. Spaeth* of North Dakota, *Robert Henry* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Kenneth O. Eikenberry* of Washington, and *Joseph B. Meyer* of Wyoming; and for the Council of State Governments et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Clifton S. Elgarten*, and *Luther Zeigler*.

Briefs of *amici curiae* urging affirmance were filed for the Native Village of Tanana et al. by *Lloyd Benton Miller*, *Eric Smith*, and *David S. Case*; and for the Metlakatla Indian Community by *Charles A. Hobbs* and *Christopher T. Stearns*.

Arlinda F. Locklear, *Howard Bichler*, *Bertram Hirsch*, and *Milton Rosenberg* filed a brief for the Miccosukee Tribe of Indians of Florida et al. as *amici curiae*.

municipal corporation. Alaska Stat. Ann. § 29.89.050 (1984). The State's attorney general believed the statute to be unconstitutional. In his view, Native village governments were "racially exclusive groups" or "racially exclusive organizations" whose status turned exclusively on the racial ancestry of their members; therefore, the attorney general believed, funding these groups would violate the equal protection clause of Alaska's Constitution. Acting on the attorney general's advice, the Commissioner of Alaska's Department of Community and Regional Affairs (petitioner here), enlarged the program to include all unincorporated communities, whether administered by Native governments or not. Shortly thereafter, the legislature increased funding under the program to match its increased scope. Funding, however, never reached the full $25,000 initially allocated to each unincorporated Native community.

The legislature repealed the revenue-sharing statute in 1985, see 1985 Alaska Sess. Laws, ch. 90, and replaced it with one that matched the program as expanded by the commissioner. In the same year, respondents filed this suit, challenging the commissioner's action on federal equal protection grounds, and seeking an order requiring the commissioner to pay them the money that they would have received had the commissioner not enlarged the program. The District Court initially granted an injunction to preserve sufficient funds for the 1986 fiscal year, but then dismissed the suit as violating the Eleventh Amendment. The Court of Appeals for the Ninth Circuit reversed, first on the ground that 28 U. S. C. § 1362 constituted a congressional abrogation of Eleventh Amendment immunity, *Native Village of Noatak* v. *Hoffman*, 872 F. 2d 1384 (1989) (later withdrawn), and then, upon reconsideration, on the ground that Alaska had no immunity against suits by Indian tribes. 896 F. 2d 1157 (1989). We granted certiorari *sub nom. Hoffman* v. *Native Village of Noatak*, 498 U. S. 807 (1990).

II

The Eleventh Amendment provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Despite the narrowness of its terms, since *Hans* v. *Louisiana*, 134 U. S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 472 (1987) (plurality opinion); *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 290–294 (1973) (MARSHALL, J., concurring in result); and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention." See *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U. S. 299, 304 (1990); *Welch*, *supra*, at 474 (plurality opinion); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 238 (1985); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 99 (1984).

Respondents do not ask us to revisit *Hans;* instead they argue that the traditional principles of immunity presumed by *Hans* do not apply to suits by sovereigns like Indian tribes. And even if they did, respondents contend, the States have consented to suits by tribes in the "plan of the convention." We consider these points in turn.

In arguing that sovereign immunity does not restrict suit by Indian tribes, respondents submit, first, that sovereign

immunity only restricts suits by *individuals* against sovereigns, not by *sovereigns* against sovereigns, and as we have recognized, *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505, 509 (1991), Indian tribes are sovereigns. Respondents' conception of the nature of sovereign immunity finds some support both in the apparent understanding of the Founders and in dicta of our own opinions.[1] But whatever the reach or meaning of these early statements, the notion that traditional principles of sovereign immunity only restrict suits by individuals was rejected in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313 (1934). It is with that opinion, and the conception of sovereignty that it embraces, that we must begin.

In *Monaco*, the Principality had come into possession of Mississippi state bonds, and had sued Mississippi in federal court to recover amounts due under those bonds. Mississippi defended on grounds of the Eleventh Amendment, among others. Had respondents' understanding of sovereign immunity been the Court's, the Eleventh Amendment would not have limited the otherwise clear grant of jurisdic-

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[1] As Alexander Hamilton said: "It is inherent in the nature of sovereignty, not to be amenable to the suit of an *individual* without its consent." The Federalist No. 81, pp. 548–549 (J. Cooke ed. 1961) (emphasis added and deleted). James Madison expressed a similar understanding at the Virginia Convention ("It is not in the power of *individuals* to call any state into court"), 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1863) (emphasis added), as did Chief Justice Marshall ("[A]n *individual* cannot proceed to obtain judgment against a state, though he may be sued by a state"), *id.*, at 555–556 (emphasis added). In *United States* v. *Texas*, 143 U. S. 621, 645 (1892), we adverted to respondents' distinction explicitly, describing *Hans* v. *Louisiana*, 134 U. S. 1 (1890), as having "proceeded upon the broad ground that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an *individual* without its consent,'" 143 U. S., at 645–646, and concluding that "the suability of one government by another government . . . does no violence to the inherent nature of sovereignty." *Id.*, at 646.

tion in Article III to hear controversies "between a State . . . and foreign States." But we held that it did.

> "Manifestly, we cannot rest with a mere literal application of the words of §2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.' The Federalist, No. 81." *Monaco*, *supra*, at 322–323 (footnote omitted).

Our clear assumption in *Monaco* was that sovereign immunity extends against both individuals and sovereigns, so that there must be found inherent in the plan of the convention a surrender by the States of immunity as to either. Because we perceived in the plan "no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State," *id.*, at 330, we concluded that foreign states were still subject to the immunity of the States.

We pursue the same inquiry in the present case, and thus confront respondents' second contention: that the States waived their immunity against Indian tribes when they adopted the Constitution. Just as in *Monaco* with regard to foreign sovereigns, so also here with regard to Indian tribes, there is no compelling evidence that the Founders thought such a surrender inherent in the constitutional compact.[2]

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[2] The only evidence alluded to by respondents is a statement by President Washington to Chief Cornplanter of the Seneca Nation:

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States.

. . . . . .

We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits by sister States, *South Dakota* v. *North Carolina*, 192 U. S. 286, 318 (1904), and suits by the United States, *United States* v. *Texas*, 143 U. S. 621 (1892). We have not found a surrender by the United States to suit by the States, *Kansas* v. *United States*, 204 U. S. 331, 342 (1907); see Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1, 79–80 (1988), nor, again, a surrender by the States to suit by foreign sovereigns, *Monaco*, *supra*.

Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, *Potawatomi Tribe*, *supra*, at 509, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

III

Respondents argue that, if the Eleventh Amendment operates to bar suits by Indian tribes against States without their

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"If . . . you have any just cause of complaint against [a purchaser], and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." 4 American State Papers, Indian Affairs, Vol. 1, p. 142 (1832). But of course, denying Indian tribes the right to sue States in federal court does not disadvantage them in relation to "all other persons." Respondents are asking for access more favorable than that which others enjoy.

consent, 28 U. S. C. § 1362 operates to void that bar. They press two very different arguments, which we consider in turn.

A

In *United States* v. *Minnesota*, 270 U. S. 181 (1926), we held that the United States had standing to sue on behalf of Indian tribes as guardians of the tribes' rights, and that, since "the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States," *id.*, at 195, no Eleventh Amendment bar would limit the United States' access to federal courts for that purpose. Relying upon our decision in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), respondents argue that we have read § 1362 to embody a general delegation of the authority to sue on the tribes' behalf from the Federal Government back to tribes themselves. Hence, respondents suggest, because the United States would face no sovereign immunity limitation, in no case brought under § 1362 can sovereign immunity be a bar.

Section 1362 provides as follows:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

What is striking about this most unremarkable statute is its similarity to any number of other grants of jurisdiction to district courts to hear federal-question claims. Compare it, for example, with § 1331(a) as it existed at the time § 1362 was enacted:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or

treaties of the United States." 28 U. S. C. § 1331(a) (1964 ed.).

Considering the text of § 1362 in the context of its enactment, one might well conclude that its *sole* purpose was to eliminate any jurisdictional minimum for "arising under" claims brought by Indian tribes. Tribes already had access to federal courts for "arising under" claims under § 1331, where the amount in controversy was greater than $10,000; for all that appears from its text, § 1362 merely extends that jurisdiction to claims below that minimum. Such a reading, moreover, finds support in the very title of the Act that adopted § 1362: "To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, and for other purposes." 80 Stat. 880.

Moe, however, found something more in the title's "other purposes"—an implication that "a tribe's access to federal court to litigate [federal-question cases] would be *at least in some respects* as broad as that of the United States suing as the tribe's trustee," 425 U. S., at 473 (emphasis added). The "respect" at issue in *Moe* was access to federal court for the purpose of obtaining injunctive relief from state taxation. The Tax Injunction Act, 28 U. S. C. § 1341, denied such access to persons other than the United States; we held that § 1362 revoked that denial as to Indian tribes. *Moe* did not purport to be saying that § 1362 equated tribal access with the United States' access *generally*, but only "at least in some respects," 425 U. S., at 473, or "in certain respects," *id.*, at 474. Respondents now urge us, in effect, to eliminate this limitation utterly—for it is impossible to imagine any more extreme replication of the United States' ability to sue than replication even to the point of allowing unconsented suit against state sovereigns. This is a vast expansion upon *Moe*. Section 1341, which *Moe* held § 1362 to eliminate in its application to tribal suits, was merely a limitation that Congress itself had created—commiting state tax-injunction suits

to state courts as a matter of comity. Absent that statute, state taxes could constitutionally be enjoined. See *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71, n. 10 (1989).[3] The obstacle to suit in the present case, by contrast, is a creation not of Congress but of the Constitution. A willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter, especially when limitation to "certain respects" has explicitly been announced.

Moreover, as we shall discuss in Part III–B, our cases require Congress' exercise of the power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakeable clarity. To avoid that difficulty, respondents assert that § 1362 represents not an abrogation of the States' sovereign immunity, but rather a *delegation* to tribes of the Federal Government's exemption from state sovereign immunity. We doubt, to begin with, that that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

But in any event, assuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such

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[3] Such injunction suits can only be brought against state officers in their official capacity and not against the State in its own name. *Missouri* v. *Fiske*, 290 U. S. 18, 27 (1933). Respondents argue that since the plaintiffs in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), named the State of Montana as a defendant, as well as individual officers, the decision in that case held that § 1362 eliminated not only the statutory bar of § 1341 but sovereign immunity as well. We think not. Since Montana had not objected in this Court on sovereign immunity grounds, its immunity had been waived and was not at issue.

a strange notion. Even if our decision in *Moe* could be regarded as in any way related to sovereign immunity, see n. 3, *supra*, it could nevertheless not be regarded as in any way related to congressional "delegation." The opinion does not mention that word, and contains not the slightest suggestion of such an analysis. To say that "§ 1362 . . . suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf," 425 U. S., at 474, does not remotely imply delegation—only equivalence of treatment. The delegation theory is entirely a creature of respondents' own invention.

B

Finally, respondents ask us to recognize § 1362 as a congressional abrogation of Eleventh Amendment immunity. We have repeatedly said that this power to abrogate can only be exercised by a clear legislative statement. As we said in *Dellmuth* v. *Muth*, 491 U. S. 223 (1989):

> "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Id.*, at 227–228.

We agree with petitioner that § 1362 does not reflect an "unmistakably clear" intent to abrogate immunity, made plain "in the language of the statute." As we have already noted, the text is no more specific than § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions.[4]

[4] In asserting that § 1362's grant of jurisdiction to "all civil actions" suffices to abrogate a State's defense of immunity, *post*, at 795–796, the dis-

Respondents' argument, however, is not that § 1362 is a "clear statement" under the standard of *Dellmuth*, but rather that it *was* a sufficiently clear statement under the standard of *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964), the existing authority for "abrogation" at the time of § 1362's enactment in 1966. In *Parden*, we found a sufficiently clear intent to avoid state immunity in a statute that subjected to liability "every" common carrier in interstate commerce, where the State, after the statute's enactment, chose to become a carrier in interstate commerce. *Id.*, at 187–188. Similarly, respondents argue, a statute that grants jurisdiction to district courts to hear "all civil actions, brought by any Indian tribe" should constitute a sufficiently clear expression of intent to abrogate immunity. *Dellmuth* is not to the contrary, respondents maintain, since the statute there was enacted in the mid-1970's, long after the rule of *Parden* had been drawn into question. *Dellmuth*, *supra*, at 231.

We shall assume for the sake of argument (though we by no means accept) that Congress must be presumed to have had as relatively obscure a decision as *Parden* in mind as a backdrop to all its legislation. But even if Congress were aware of *Parden*'s minimal clarity requirement, nothing in *Parden* could lead Congress to presume that that requirement applied to the *abrogation* of state immunity. *Parden* itself neither mentioned nor was premised upon abrogation. Its theory was that, by entering a field of economic activity that is federally regulated, the State impliedly "consent[s]" to be

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sent has just repeated the mistake of the Court in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), see *id.*, at 434–450 (Iredell, J., dissenting), the case that occasioned the Eleventh Amendment itself. The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct. A State may waive its Eleventh Amendment immunity, and if it does, § 1362 certainly would grant a district court jurisdiction to hear the claim. The dissent's view returns us, like Sisyphus, to the beginning of this 200-year struggle.

bound by that regulation and to be subject to suit in federal court on the same terms as other regulated parties, thus "waiv[ing]" its Eleventh Amendment immunity. 377 U. S., at 186. Not until 1976 (10 years after the passage of § 1362) did we first acknowledge a congressional power to abrogate state immunity—under § 5 of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). Thus, *Parden* would have given Congress no reason to believe it could abrogate state sovereign immunity and gives us no reason to believe that Congress intended abrogation by a means so subtle as § 1362. At the time § 1362 was enacted, abrogation would have been regarded as such a novel (not to say questionable) course that a general "arising under" statute like § 1362 would not conceivably have been thought to imply it. We conclude that neither under the current standard of *Dellmuth* nor under any standard in effect at the time of *Parden* was § 1362 an abrogation of state sovereign immunity.[5]

IV

Finally, respondents argue that even if the Eleventh Amendment bars their claims for damages, they still seek injunctive relief, which the Eleventh Amendment would not bar. The Court of Appeals, of course, did not address this point, and we leave it for that court's initial consideration on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The Court today holds that our Eleventh Amendment precludes Native American tribes from seeking to vindicate in

[5] Because we find that § 1362 does not enable tribes to overcome Alaska's sovereign immunity, we express no view on whether these respondents qualify as "tribes" within the meaning of that statute.

federal court rights they regard as secured to them by the United States Constitution. Because the Court resolves this case through reliance on a doctrine I cannot accept, and because I believe its construction of the pertinent jurisdictional statute to be otherwise flawed, I dissent.

I

As some of us previously have stated, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 302 (1985) (dissenting opinion), I do not believe the Eleventh Amendment is implicated by a suit such as this one, in which litigants seek to vindicate federal rights against a State. In my view, the Amendment has no application outside the context of State/citizen and State/alien diversity suits.* Put another way, "[t]here simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court." *Id.*, at 259 (Brennan, J., dissenting).

The substantial historical analysis that supports this view already has been exhaustively detailed, see *id.*, at 258–302 (Brennan, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissenting); *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 497 (1987) (Brennan, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissenting); *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 23 (1989) (STEVENS, J., concurring); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 140–159 (1984) (STEVENS, J., joined by Brennan, MARSHALL, and BLACKMUN, JJ., dissenting), and I shall not repeat it here. It bears emphasis, however, that the Court need not have compounded the error of *Hans* v. *Louisiana*, 134 U. S. 1

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*The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

(1890), and its progeny by extending the doctrine of state sovereign immunity to bar suits by tribal entities, which are neither "Citizens of another State," nor "Citizens or Subjects of any Foreign State."

II

Even assuming that the State at one time may have possessed immunity against tribal suits, that immunity was abrogated by Congress when, in 1966, 80 Stat. 880, it enacted 28 U. S. C. § 1362. The majority rejects this argument, holding that § 1362 cannot authorize respondents' suit because the statute's language does not reflect an "unmistakably clear" intent to abrogate the States' sovereign immunity. *Ante*, at 786. I have never accepted the validity of that so-called "clear-statement rule" and I remain of the view, expressed by Justice Brennan for four of us in *Atascadero*, that such "special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress . . . . [T]he special rules are designed as hurdles to keep the disfavored suits out of the federal courts." 473 U. S., at 254.

Even if I were to accept the proposition that the clear-statement rule at times might serve as a mechanism for discerning congressional intent, I surely would reject its application here. Despite the Court's attempt to give it a constitutional cast, the clear-statement rule, at bottom, is a tool of statutory construction like any other. So it must be, for the Judiciary has no power to redraw legislative enactments; where Congress has the authority to regulate a sphere of activity, we simply must do our best to determine whether it has done so in any particular instance. The majority's rule is one method for accomplishing that task. It is premised on the perception that Congress does not casually alter the "balance of power" between the Federal Government and the States. *Id.*, at 242. Because federal intrusion into state authority is the unusual case, and because courts are to use caution in determining when their own jurisdiction

has been expanded, *id.*, at 243, this Court has erected the clear-statement rule in order to be certain that abrogation is Congress' plan.

Whatever the validity of that determination may be generally, it cannot extend to matters concerning federal regulation of Native American affairs; in that sphere of governmental operations, the "balance of power" always has weighed heavily against the States and in favor of the Federal Government. Indeed, "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*, 417 U. S. 535, 551–552 (1974).

Illustrative of this principle are our cases holding that the law of the State is generally inapplicable to Native American affairs, absent the consent of Congress. See, *e. g.*, *Worcester* v. *Georgia*, 6 Pet. 515 (1832). Chief Justice Marshall explained for the Court in *Worcester* that a federally recognized tribe

> "is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of [the State] can have no force, and which the citizens of [the State] have no right to enter, but with the assent of the [tribes] themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States." *Id.*, at 561.

Despite the States' undeniable interest in regulating activities within its borders, and despite traditional principles of federalism, the States' authority has been largely displaced in matters pertaining to Native Americans. See *The Kansas Indians*, 5 Wall. 737 (1867) (finding state taxes inapplicable to tribal lands despite partial assimilation of tribe into white society); *United States* v. *Kagama*, 118 U. S. 375 (1886) (sustaining validity of a prosecution of Native Americans in federal court under the Indian Major Crimes Act). Moreover,

federal displacement of state authority regarding Native American affairs has not been limited to the geographic boundaries of "Indian country," see *Antoine* v. *Washington*, 420 U. S. 194 (1975) (holding that Congress may constitutionally inhibit a State's exercise of its police power over non-Indian land through federal legislation ratifying an agreement with a tribe), nor to state regulations that directly infringe upon tribal self-government. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 179–180 (1973).

Thus, in this area, the pertinent "balance of power" is between the Federal Government and the tribes, with the States playing only a subsidiary role. Because spheres of activity otherwise susceptible to state regulation are, "according to the settled principles of our Constitution, . . . committed exclusively to the government of the Union," *Worcester* v. *Georgia*, 6 Pet., at 561, where Native American affairs are concerned, the presumptions underlying the clear-statement rule, and thus the rule itself, have no place in interpreting statutes pertaining to the tribes.

Employing the traditional tools of statutory interpretation, I conclude that Congress intended, through § 1362, to authorize constitutional claims for damages by tribes against the States. Section 1362 provides:

> "The district courts shall have original jurisdiction of *all* civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." (Emphasis added.)

The majority notes, correctly, that this language is no broader than that of 28 U. S. C. § 1331(a), as it existed at the time § 1362 was enacted. *Ante*, at 784. As the preceding discussion makes clear, however, this is an area in which "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). A review of the

history of the latter statute reveals that Congress intended § 1362 to have a broader reach.

Prior to 1966, the Indian tribes were largely dependent upon the United States Government to enforce their rights against state encroachment. See, *e. g.*, *United States* v. *Minnesota*, 270 U. S. 181 (1926). This arrangement derived from the historic trust relationship between the tribes and the United States. See F. Cohen, Handbook of Federal Indian Law 308 (1982 ed.). In seeking judicial protection of tribal interests, the Federal Government, of course, was unrestrained by the doctrine of state sovereign immunity. *United States* v. *Minnesota*, 270 U. S., at 195, citing *United States* v. *Texas*, 143 U. S. 621 (1892).

In 1966, Congress enacted 28 U. S. C. § 1362 as part of a larger national policy of "self-determination" for the Native American peoples. See M. Price & R. Clinton, Law and the American Indian 86–91 (2d ed. 1983). Consistent with that policy, "Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians." *Arizona* v. *San Carlos Apache Tribe*, 463 U. S. 545, 560, n. 10 (1983). In other words, Congress sought to eliminate the tribes' dependence upon the United States for the vindication of federal rights in the federal courts.

In light of that legislative purpose, we held in *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), that the Tax Injunction Act, 28 U. S. C. § 1341, does not bar an action to enjoin the collection of state taxes brought by a tribe pursuant to § 1362, although it precludes such a suit by a private litigant. Construing § 1362, we identified a congressional intent that "a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U. S., at 473. Because the Federal Government could have brought

such a suit on the tribes' behalf, see *Heckman* v. *United States*, 224 U. S. 413 (1912), we held that the tribes were similarly empowered by § 1362.

I agree with respondents that the litigation authority bestowed on the tribes through § 1362 also includes the right to bring federal claims against the States for damages. The legislative history of the statute reveals Congress' intention that the tribes bring litigation "involving issues identical to those" that would have been raised by the United States acting as trustee for the tribes. H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2 (1966) (House Report). There is no reason to believe that this authority would be limited to prospective relief in the broad range of suits brought against the States.

Fundamentally, the vindication of Native American rights has been the institutional responsibility of the Federal Government since the Republic's founding. See, *e. g.*, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831). Section 1362 represents a frank acknowledgment by the Government that it often lacks the resources or the political will adequately to fulfill this responsibility. Given this admission, we should not lightly restrict the authority granted the tribes to defend their own interests. Rather, the most reasoned interpretation of § 1362 is as a congressional authorization to bring those suits that are necessary to vindicate fully the federal rights of the tribes. It hardly requires explication that monetary remedies are often necessary to afford such relief. Providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys," House Report, at 2–3, necessarily entails access to monetary redress from the States where federal rights have been violated.

In resisting this conclusion, the majority asserts that, because the Tax Injunction Act is merely a congressional enactment while the doctrine of sovereign immunity is a constitu-

tional one, a "willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter." *Ante*, at 785. But the premise does not lead to the conclusion. Congress, through appropriate legislation, may abrogate state sovereign immunity, just as it may repeal or amend its own prior enactments. Moreover, the Tax Injunction Act, like the sovereign immunity doctrine, is rooted in historical notions of federalism and comity. See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 103 (1981), and cases cited therein. In light of these parallels, I find the expansive congressional purpose the Court identified in *Moe* to provide substantial support for the proposition that § 1362 was intended to convey federal jurisdiction over "*all* civil actions," § 1362 (emphasis added), brought by recognized tribes that the Government could have brought on their behalf.

"Finally, in construing this 'admittedly ambiguous' statute, *Board of Comm'rs* v. *Seber*, [318 U. S. 705, 713 (1943)], we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918)." *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976). Unlike the ill-conceived interpretive rule adopted so recently in *Atascadero*, this canon of construction dates back to the earliest years of our Nation's history. See, *e. g.*, *Worcester* v. *Georgia*, 6 Pet., at 582; *The Kansas Indians*, 5 Wall. 737 (1867); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912). Indeed, it is rooted in the unique trust relationship between the tribes and the Federal Government that is inherent in the constitutional plan. See U. S. Const., Art. I, § 8, cl. 3; Art. I, § 2, cl. 3. In light of this time-honored principle of construction, it requires no linguistic contortion to read § 1362's grant of federal jurisdiction over "all civil actions" to encom-

pass all tribal litigation that the United States could have brought as the tribes' guardian.

III

Having concluded that respondents' suit may be brought in federal court, I agree with the Court of Appeals that respondents are recognized "tribe[s] or band[s]" for purposes of § 1362, and that they have alleged a federal cause of action. Accordingly, I would affirm the judgment of the Court of Appeals. I respectfully dissent from this Court's reversal of that judgment.

Syllabus

YLST, WARDEN *v.* NUNNEMAKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–68. Argued March 19, 1991—Decided June 24, 1991

Following his California murder conviction, respondent raised a *Miranda* claim for the first time on direct appeal, in violation of a state procedural rule. In affirming the conviction, the State Court of Appeal rejected the claim on the sole basis of the procedural bar. After successive petitions for collateral relief were denied without opinion by the State Superior Court and Court of Appeal, respondent filed a habeas petition in the State Supreme Court, which denied relief without opinion or explanation, citing its decisions in *In re Swain* and *In re Waltreus*. When the State Supreme Court denied, without opinion or citation, a second habeas petition to it, respondent filed a habeas petition raising the *Miranda* claim in Federal District Court. That court found that the state procedural default barred federal review, but the Court of Appeals reversed this determination. Relying on this Court's statement in *Harris* v. *Reed*, 489 U. S. 255, 263, that state procedural default bars federal review only when the state court clearly and expressly states its reliance on that ground, the court held that the State Supreme Court's "silent denial" of respondent's second state habeas petition lifted the procedural bar imposed on direct review.

Held: A state court's unexplained denial of a habeas petition raising federal claims is not sufficient, for purposes of federal review, to lift a procedural bar imposed on direct appeal. Pp. 801–806.

(a) The Court of Appeals erred in applying a presumption that when a state court denies a federal claim without explicit reliance on state grounds, the merits of the federal claim are the basis for the judgment. The *Harris* presumption in favor of federal review is to be applied only after it has been determined that "the relevant state court decision . . . fairly appear[s] to rest primarily on federal law or [is] interwoven with [federal] law." *Coleman* v. *Thompson*, *ante*, at 740. P. 802.

(b) With respect to unexplained state-court judgments, federal habeas courts should apply the following presumption: where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," it should be presumed that no procedural default has been invoked by a subsequent unexplained order that leaves the judg-

ment or its consequences in place. Similarly, where the last reasoned opinion on the claim explicitly imposes a procedural default, it should be presumed that a later decision rejecting the claim did not silently disregard the bar and consider the merits. This "look-through" presumption may be rebutted by *strong* evidence to the contrary. Pp. 803–804.

(c) The last *explained* state-court judgment on respondent's *Miranda* claim was that of the Court of Appeal on direct review, which unequivocally rested upon a state procedural default. None of the later judgments or orders was informative on the reason for denying the *Miranda* claim, nor has respondent adduced strong evidence that one of them reached the merits of that claim. Thus, federal-court review is barred unless respondent can establish "cause and prejudice" for his default, see *Murray* v. *Carrier*, 477 U. S. 478, 493, 495–496. On remand, the Court of Appeals must determine whether he has done so. Pp. 805–806.

904 F. 2d 473, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 806. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 807.

Clifford K. Thompson, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Daniel E. Lungren*, Attorney General of California, *John K. Van de Kamp*, former Attorney General, *George H. Williamson*, Chief Assistant Attorney General, *Richard B. Iglehart*, former Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Ronald E. Niver*, Deputy Attorney General.

Juliana Drous, by appointment of the Court, 498 U. S. 997, argued the cause and filed a brief for respondent.*

*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *Ronald L. Crismon*, and *Joseph T. Maziarz*, Assistant Attorney General, *Charles E. Cole*, Attorney General of Alaska, *John J. Kelly*, Chief State's Attorney of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Jim Jones*, Attorney General of Idaho, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Ernest*

JUSTICE SCALIA delivered the opinion of the Court.

In this case we decide whether the unexplained denial of a petition for habeas corpus by a state court lifts a state procedural bar imposed on direct appeal, so that a state prisoner may then have his claim heard on the merits in a federal habeas proceeding.

I

In 1975, respondent Nunnemaker was tried in California state court for murder. He raised a defense of diminished capacity and introduced psychiatric testimony in support. In response, the State introduced—without objection from respondent—the testimony of a psychiatrist based upon a custodial interview. The jury found respondent guilty. He appealed, claiming for the first time that the State's psychiatric testimony was inadmissible because the interview had not been preceded by a *Miranda* warning, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In addition, he alleged that his attorney's failure to object to the psychiatric testimony amounted to ineffective assistance of counsel, and raised other claims not relevant here.

The California Court of Appeal affirmed the conviction. The sole basis for its rejection of the *Miranda* claim was the state procedural rule that "an objection based upon a *Miranda* violation cannot be raised for the first time on appeal." App. 15. See *People* v. *Bennett*, 60 Cal. App. 3d 112, 116, 131 Cal. Rptr. 305, 306–307 (1976); *In re Dennis M.*, 70 Cal. 2d 444, 461–462, 450 P. 2d 296, 306–307 (1969). The California Supreme Court denied discretionary review on September 27, 1978.

D. Preate, Jr., Attorney General of Pennsylvania, *Paul Van Dam*, Attorney General of Utah, *Mary Sue Terry*, Attorney General of Virginia, and *Kenneth O. Eikenberry*, Attorney General of Washington; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*; and for the Office of the Wayne County Prosecuting Attorney by *John D. O'Hair, pro se*, and *Timothy A. Baughman*.

In 1985, respondent filed a petition for collateral relief in California Superior Court. The petition was denied without opinion. Respondent then filed a similar petition for relief in the California Court of Appeal, invoking that court's original jurisdiction. That petition was also denied without opinion. Finally, respondent filed a petition for habeas corpus in the California Supreme Court, invoking the original jurisdiction of that tribunal. That petition was denied on December 3, 1986, with citation of *In re Swain*, 34 Cal. 2d 300, 304, 209 P. 2d 793, 796 (1949), and *In re Waltreus*, 62 Cal. 2d 218, 225, 397 P. 2d 1001, 1005 (1965). App. 82. No opinion or other explanation accompanied these citations.

Respondent next filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The court dismissed the petition without prejudice, ruling that it was not clear whether respondent had exhausted his state remedies with respect to all his claims.[1] See *Rose* v. *Lundy*, 455 U. S. 509 (1982). Respondent then filed a second petition for habeas relief in the California Supreme Court, again invoking that court's original jurisdiction. That petition was denied, without opinion or case citation, on April 7, 1988.

Respondent then filed a second petition for habeas relief in the Northern District of California, raising the *Miranda* claim and the ineffectiveness claim. The court rejected the ineffectiveness claim on the merits. As to the *Miranda* claim, the court found that respondent's state procedural default barred federal review. Respondent appealed. The Court of Appeals for the Ninth Circuit reversed in part. The court agreed that the ineffective-assistance claim was

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[1] In fact he had. The California Court of Appeal decision on direct review shows that all claims, including the *Miranda* claim and the ineffectiveness claim, were presented to, and specifically addressed by, that court. See App. 15, 17. The District Court's mistake on this point was apparently caused by respondent's own statement "that none of his claims were *[sic]* raised by way of direct appeal." *Id.*, at 83.

meritless. However, relying upon our intervening opinion in *Harris* v. *Reed*, 489 U. S. 255 (1989), the court held that the California Supreme Court's "silent denial" of respondent's second state habeas petition to that court lifted the procedural bar arising from the decision on direct review. Specifically, the Ninth Circuit held that because the California Supreme Court did not "clearly and expressly state its reliance on Nunnemaker's procedural default," the federal court could not say that the Supreme Court's order "was based on a procedural default rather than on the underlying merits of Nunnemaker's claims." 904 F. 2d 473, 476 (1990). We granted certiorari, 498 U. S. 957 (1990).

II

The last state court to render a judgment on the *Miranda* claim as of 1978, the California Court of Appeal, expressly found a procedural default. When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court. *Wainwright* v. *Sykes*, 433 U. S. 72, 87–88 (1977); *Murray* v. *Carrier*, 477 U. S. 478, 485–492 (1986). Thus, had respondent proceeded to federal habeas on the basis of the *Miranda* claim upon completing his direct review in 1978, federal review would have been barred by the state-law procedural default.

State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available. See *Harris*, *supra*, at 262. We consider, therefore, whether the California Supreme Court's unexplained order denying his second habeas petition to that court, which according to the Ninth Circuit sought relief on the basis of his *Miranda* claim, constituted a "decision on the merits" of that claim sufficient to lift the procedural bar imposed on direct appeal.

The Ninth Circuit concluded that it did constitute a decision on the merits by applying a presumption that when a federal claim is denied without explicit reliance on state grounds, the merits of the federal claim are the basis for the judgment. Petitioner argues that that was error,[2] and we agree. The Ninth Circuit thought itself to be following our decision in *Harris* v. *Reed*, *supra*, at 263. As we have since made clear, however, see *Coleman* v. *Thompson*, *ante*, p. 722, the *Harris* presumption is to be applied only after it has been determined that "the relevant state court decision . . . fairly appear[s] to rest primarily on federal law or [is] interwoven with [federal] law." *Ante*, at 740.

The consequent question presented by the present case, therefore, is how federal courts in habeas proceedings are to determine whether an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) rests primarily on federal law. The question is not an easy one. In *Coleman* itself, although the order was unexplained, the nature of the disposition ("dismissed" rather than "denied") and surrounding circumstances (in particular the fact that the State had rested its argument entirely upon a procedural bar), indicated that the basis was procedural default. But such clues

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[2] Petitioner also argues that in California original habeas corpus jurisdiction is discretionary, so that denial of a petition is not a "judgment," and the last state-court "judgment" to which we should look is that of the Court of Appeal on direct review. Respondent concedes that a discretionary denial of review cannot lift a pre-existing procedural bar, and the federal courts are in accord. See *Goodwin* v. *Collins*, 910 F. 2d 185, 187 (CA5 1990); *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1382–1383 (CA7 1990). Respondent denies, however, that California courts have any discretion not to entertain habeas corpus petitions. The state law on this question is not clear, and we shall assume for purposes of this case that respondent is right. We also assume, since the point has not been argued, that *Miranda* claims such as that raised by respondent are cognizable in federal habeas corpus. See *Duckworth* v. *Eagan*, 492 U. S. 195, 205–214 (1989) (O'Connor, J., concurring); cf. *Stone* v. *Powell*, 428 U. S. 465 (1976).

will not always, or even ordinarily, be available. Indeed, sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent.

The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," *Coleman*, *ante*, at 740, we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits. This approach accords with the view of every Court of Appeals to consider the matter, save the court below. See *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1383 (CA7 1990) (dicta); *Harmon* v. *Barton*, 894 F. 2d 1268, 1272 (CA11 1990); *Evans* v. *Thompson*, 881 F. 2d 117, 123, n. 2 (CA4 1989); *Ellis* v. *Lynaugh*, 873 F. 2d 830, 838 (CA5 1989).

This presumption assists, as we have said, not only administrability but accuracy as well—unlike the application of *Harris* to unexplained orders, which achieves the former at the expense of the latter. As applied to an unexplained order leaving in effect a decision (or, in the case of habeas, the consequences of a decision) that expressly relies upon procedural bar, the *Harris* presumption would interpret the order as rejecting that bar and deciding the federal question

on the merits. That is simply a most improbable assessment of what actually occurred. The maxim is that silence implies consent, not the opposite—and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect—which simply "looks through" them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play.[3]

Respondent poses various hypotheticals in which this presumption would not produce a correct assessment of the state-court disposition. We need not consider them, because we do not suggest that the presumption is irrebuttable; strong evidence can refute it. It might be shown, for example, that even though the last reasoned state-court opinion had relied upon a procedural default, a retroactive change in law had eliminated that ground as a basis of decision, and the court which issued the later unexplained order had directed extensive briefing limited to the merits of the federal claim. Or it might be shown that, even though the last reasoned state-court opinion had relied upon a federal ground, the later appeal to the court that issued the unexplained order was plainly out of time, and that the latter court did not ordinarily waive such a procedural default without saying so.

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[3] The only common circumstance in which the presumption is unrealistic is that in which the later state decision rests upon a prohibition against *further* state review—for example, an unexplained denial of state habeas resting in fact upon a rule (such as petitioner contends exists in California) preventing the relitigation on state habeas of claims raised on direct appeal. In that circumstance, even though the presumption does not posit the real reason for the later denial, it does produce a result ("looking through" to the last reasoned decision) that is the correct one for federal habeas courts. Since a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default, its effect upon the availability of federal habeas is nil—which is precisely the effect accorded by the "look-through" presumption.

While we acknowledge that making the presumption rebuttable will make it less efficient than the categorical approach taken by the Courts of Appeals that have adopted the "look-through" methodology, see *Prihoda*, *supra*, at 1383; *Harmon*, *supra*, at 1272; *Evans*, *supra*, at 123, n. 2; *Ellis*, *supra*, at 838, we think it will still simplify the vast majority of cases. The details of state law need not be inquired into unless, if they should be as the habeas petitioner asserts, they would constitute *strong* evidence that the presumption, as applied, is wrong.

To decide the present case, therefore, we begin by asking which is the last *explained* state-court judgment on the *Miranda* claim. Obviously it is not the second denial of habeas by the California Supreme Court; although that was the last judgment, it said absolutely nothing about the reasons for the denial. The first denial of habeas by that court, on December 3, 1986, did cite (without any elaboration) two state cases, *Swain* and *Waltreus*. The former holds that facts relied upon in a habeas petition must be alleged with particularity, and the latter that claims presented on direct review ordinarily may not be relitigated on state habeas. Even if we knew that the court intended to apply both of these cases to the *Miranda* claim (as opposed to the other claims raised by the same petition), that would be irrelevant to the point before us here. Respondent had exhausted his *Miranda* claim by presenting it on direct appeal, and was not required to go to state habeas at all, see *Castille* v. *Peoples*, 489 U. S. 346, 349–350 (1989); state rules against that superfluous recourse have no bearing upon his ability to raise the *Miranda* claim in federal court. Thus, although the California Supreme Court's denial of respondent's first habeas petition to it was not utterly silent, neither was it informative with respect to the question before us.

The prior denials of respondent's state habeas petitions by the two lower California courts were silent; and, as discussed above, the discretionary denial of review on direct appeal by

the California Supreme Court is not even a "judgment." Thus, the last state opinion on the *Miranda* claim is that of the Court of Appeal on direct review, and that opinion unequivocally rested upon a state procedural default. We look through the subsequent unexplained denials to that opinion, unless respondent has carried his burden of adducing strong evidence that one of the subsequent courts reached the merits of the federal claim. He has not done so. He claims to be able to show that California habeas courts could have allowed him to relitigate his *Miranda* claim, in spite of the ordinary state rule barring relitigation of claims raised on direct appeal. See, *e. g.*, *Waltreus*, 62 Cal. 2d, at 225, 397 P. 2d, at 1005. But even if he established that, to prove that they *could* do so is not to prove that they *did* do so—much less to prove that, *having* done so, they decided the relitigated point on the merits rather than on the basis of the procedural default relied upon in 1978. Respondent has adduced nothing to show that any California court actually reached the merits of his federal claim. The presumption that the California Supreme Court's last unexplained order did not reach the merits, and that the bar of procedural default subsists, has not been overcome. Federal-court review of the claim is therefore barred unless respondent can establish "cause and prejudice" for the default, see *Murray* v. *Carrier*, 477 U. S., at 493, 495–496. The District Court specifically found no cause and prejudice, but, since the Court of Appeals had no occasion to review that holding, we remand for that purpose.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE WHITE, concurring.

I join the opinion and judgment of the Court but add these few words. Had the Court of Appeals stated that as a matter of state law, the State Supreme Court's summary, unexplained denial of an original petition for habeas corpus is a

ruling on the merits, the presumption the Court's opinion articulates in this case would be rebutted unless we disagreed with the Court of Appeals with respect to state law. The Court of Appeals, however, did not so state but in effect said that the state court's order was ambiguous. Hence, the presumption governs.

I also note that *Coleman* v. *Thompson*, *ante*, at 739, stated that the presumption of *Harris* v. *Reed*, 489 U. S. 255 (1989), "applies only when it fairly appears that a state-court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." In joining the Court's opinion in the case before us, I take it that the opinion's bobtailed quotation from *Coleman*, *ante*, at 802, is not intended to restrict the reach of the presumption.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

For the reasons stated in the dissent in *Coleman* v. *Thompson*, *ante*, p. 758, I also dissent in this case.

PAYNE *v.* TENNESSEE

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 90–5721. Argued April 24, 1991—Decided June 27, 1991

Petitioner Payne was convicted by a Tennessee jury of the first-degree murders of Charisse Christopher and her 2-year-old daughter, and of first-degree assault upon, with intent to murder, Charisse's 3-year-old son Nicholas. The brutal crimes were committed in the victims' apartment after Charisse resisted Payne's sexual advances. During the sentencing phase of the trial, Payne called his parents, his girlfriend, and a clinical psychologist, each of whom testified as to various mitigating aspects of his background and character. The State called Nicholas' grandmother, who testified that the child missed his mother and baby sister. In arguing for the death penalty, the prosecutor commented on the continuing effects on Nicholas of his experience and on the effects of the crimes upon the victims' family. The jury sentenced Payne to death on each of the murder counts. The State Supreme Court affirmed, rejecting his contention that the admission of the grandmother's testimony and the State's closing argument violated his Eighth Amendment rights under *Booth* v. *Maryland*, 482 U. S. 496, and *South Carolina* v. *Gathers*, 490 U. S. 805, which held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are *per se* inadmissible at a capital sentencing hearing.

Held: The Eighth Amendment erects no *per se* bar prohibiting a capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing. To the extent that this Court held to the contrary in *Booth* and *Gathers*, those cases are overruled. Pp. 817–830.

(a) There are numerous infirmities in the rule created by *Booth* and *Gathers*. Those cases were based on two premises: that evidence relating to a particular victim or to the harm caused a victim's family does not in general reflect on the defendant's "blameworthiness," and that only evidence of "blameworthiness" is relevant to the capital sentencing decision. See *Booth*, *supra*, at 504–505. However, assessment of the harm caused by the defendant has long been an important factor in determining the appropriate punishment, and victim impact evidence is simply another method of informing the sentencing authority about such harm. In excluding such evidence, the Court in *Booth*, *supra*, at 504, misread

the statement in *Woodson* v. *North Carolina*, 428 U. S. 280, 304, that the capital defendant must be treated as a "uniquely individual human bein[g]." As *Gregg* v. *Georgia*, 428 U. S. 153, 203–204, demonstrates, the *Woodson* language was not intended to describe a class of evidence that *could not* be received, but a class of evidence that *must* be received, *i. e.*, any relevant, nonprejudicial material, see *Barefoot* v. *Estelle*, 463 U. S. 880, 898. The *Booth* Court's misreading of precedent has unfairly weighted the scales in a capital trial. Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 114. The State has a legitimate interest in counteracting such evidence, but the *Booth* rule prevents it from doing so. Similarly, fairness to the prosecution requires rejection of *Gathers*' extension of the *Booth* rule to the prosecutor's argument, since, under the Eighth Amendment, this Court has given the capital defendant's attorney broad latitude to argue relevant mitigating evidence reflecting on his client's individual personality. The Court in *Booth*, *supra*, at 506–507, also erred in reasoning that it would be difficult, if not impossible, for a capital defendant to rebut victim impact evidence without shifting the focus of the sentencing hearing away from the defendant to the victim. The mere fact that for tactical reasons it might not be prudent for the defense to rebut such evidence makes the case no different from others in which a party is faced with this sort of dilemma. Nor is there merit to the concern voiced in *Booth*, *supra*, at 506, that admission of such evidence permits a jury to find that defendants whose victims were assets to their communities are more deserving of punishment than those whose victims are perceived to be less worthy. Such evidence is not generally offered to encourage comparative judgments of this kind, but is designed to show instead *each* victim's uniqueness as an individual human being. In the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief. See *Darden* v. *Wainwright*, 477 U. S. 168, 179–183. Thus, a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase victim impact evidence. Pp. 817–827.

(b) Although adherence to the doctrine of *stare decisis* is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned, *Smith* v. *Allwright*, 321 U. S. 649, 655, particularly in constitutional cases, where correction through legislative action is practically impossible, *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407 (Brandeis, J., dissenting), and in cases involving proce-

dural and evidentiary rules. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging their basic underpinnings; have been questioned by Members of this Court in later decisions; have defied consistent application by the lower courts, see, *e. g.*, *State* v. *Huertas*, 51 Ohio St. 3d 22, 33, 553 N. E. 2d 1058, 1070; and, for the reasons heretofore stated, were wrongly decided. Pp. 827–830.

791 S. W. 2d 10, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE and KENNEDY, JJ., joined, *post*, p. 830. SCALIA, J., filed a concurring opinion, in Part II of which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 833. SOUTER, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 835. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 844. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 856.

J. Brooke Lathram argued the cause and filed briefs for petitioner.

Charles W. Burson, Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *Kathy M. Principe*, Assistant Attorney General.

Attorney General Thornburgh argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Stephen L. Nightingale*.*

**Stephen B. Bright* and *J. L. Chestnut* filed a brief for the Southern Christian Leadership Conference as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; for the Washington Legal Foundation et al. by *Richard K. Willard*, *Daniel J. Popeo*, *Paul D. Kamenar*, and *Richard Samp*; and for Congressman Thomas J. Bliley, Jr., et al. by *Michael J. Lockerby* and *Frank G. Carrington*.

Briefs of *amici curiae* were filed for the State of Alabama et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, *Frederick R. Millar, Jr.*, Supervising Deputy Attorney General, and *Louis R. Hanoian*, Deputy Attorney General, *James H. Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we reconsider our holdings in *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial.

Petitioner, Pervis Tyrone Payne, was convicted by a jury on two counts of first-degree murder and one count of assault with intent to commit murder in the first degree. He was sentenced to death for each of the murders and to 30 years in prison for the assault.

The victims of Payne's offenses were 28-year-old Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas. The three lived together in an apartment in Millington, Tennessee, across the hall from Payne's girlfriend, Bobbie Thomas. On Saturday, June 27, 1987, Payne visited Thomas' apartment several times in expectation of her return from her mother's house in Arkansas, but found no one at home. On one visit, he left his overnight bag, con-

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Gale A. Norton, Attorney General of Colorado, *John J. Kelly*, Chief State's Attorney of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Frederic J. Cowan*, Attorney General of Kentucky, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Lee Fisher*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Mark W. Barnett*, Attorney General of South Dakota, and *Kenneth O. Eikenberry*, Attorney General of Washington; for the Appellate Committee of the California District Attorneys Association by *Ira Reiner*, *Harry B. Sondheim*, and *Martha E. Bellinger*; for the Justice for All Political Committee et al. by *Mario Thomas Gaboury* and *Sally S. King*; and for the National Organization for Victim Assistance et al. by *Judith Rowland*.

taining clothes and other items for his weekend stay, in the hallway outside Thomas' apartment. With the bag were three cans of malt liquor.

Payne passed the morning and early afternoon injecting cocaine and drinking beer. Later, he drove around the town with a friend in the friend's car, each of them taking turns reading a pornographic magazine. Sometime around 3 p.m., Payne returned to the apartment complex, entered the Christophers' apartment, and began making sexual advances towards Charisse. Charisse resisted and Payne became violent. A neighbor who resided in the apartment directly beneath the Christophers heard Charisse screaming, "'Get out, get out,' as if she were telling the children to leave." Brief for Respondent 3. The noise briefly subsided and then began, "'horribly loud.'" *Ibid.* The neighbor called the police after she heard a "blood curdling scream" from the Christophers' apartment. *Ibid.*

When the first police officer arrived at the scene, he immediately encountered Payne, who was leaving the apartment building, so covered with blood that he appeared to be "'sweating blood.'" The officer confronted Payne, who responded, "'I'm the complainant.'" *Id.*, at 3–4. When the officer asked, "'What's going on up there?'" Payne struck the officer with the overnight bag, dropped his tennis shoes, and fled. 791 S. W. 2d 10, 12 (Tenn. 1990).

Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1,700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.

Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, "'Man, I ain't killed no woman.'" *Id.*, at 13. According to one of the officers, Payne had "'a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid.'" *Ibid.* He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched the victims' blood types. A search of his pockets revealed a packet containing cocaine residue, a hypodermic syringe wrapper, and a cap from a hypodermic syringe. His overnight bag, containing a bloody white shirt, was found in a nearby dumpster.

At trial, Payne took the stand and, despite the overwhelming and relatively uncontroverted evidence against him, testified that he had not harmed any of the Christophers. Rather, he asserted that another man had raced by him as he was walking up the stairs to the floor where the Christophers lived. He stated that he had gotten blood on himself when, after hearing moans from the Christophers' apartment, he

had tried to help the victims. According to his testimony, he panicked and fled when he heard police sirens and noticed the blood on his clothes. The jury returned guilty verdicts against Payne on all counts.

During the sentencing phase of the trial, Payne presented the testimony of four witnesses: his mother and father, Bobbie Thomas, and Dr. John T. Hutson, a clinical psychologist specializing in criminal court evaluation work. Bobbie Thomas testified that she met Payne at church, during a time when she was being abused by her husband. She stated that Payne was a very caring person, and that he devoted much time and attention to her three children, who were being affected by her marital difficulties. She said that the children had come to love him very much and would miss him, and that he "behaved just like a father that loved his kids." She asserted that he did not drink, nor did he use drugs, and that it was generally inconsistent with Payne's character to have committed these crimes.

Dr. Hutson testified that based on Payne's low score on an IQ test, Payne was "mentally handicapped." Hutson also said that Payne was neither psychotic nor schizophrenic, and that Payne was the most polite prisoner he had ever met. Payne's parents testified that their son had no prior criminal record and had never been arrested. They also stated that Payne had no history of alcohol or drug abuse, he worked with his father as a painter, he was good with children, and he was a good son.

The State presented the testimony of Charisse's mother, Mary Zvolanek. When asked how Nicholas had been affected by the murders of his mother and sister, she responded:

> "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I

tell him yes. He says, I'm worried about my Lacie." App. 3.

In arguing for the death penalty during closing argument, the prosecutor commented on the continuing effects of Nicholas' experience, stating:

> "But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister." *Id.*, at 9.
>
> "There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> "Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer." *Id.*, at 12.

In the rebuttal to Payne's closing argument, the prosecutor stated:

> "You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will

always come into your mind, probably throughout the rest of your lives. . . .

. . . . . .

". . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.

. . . . . .

"[Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever." *Id.*, at 13–15.

The jury sentenced Payne to death on each of the murder counts.

The Supreme Court of Tennessee affirmed the conviction and sentence. 791 S. W. 2d 10 (1990). The court rejected Payne's contention that the admission of the grandmother's testimony and the State's closing argument constituted prejudicial violations of his rights under the Eighth Amendment as applied in *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989). The court characterized the grandmother's testimony as "technically ir-

relevant," but concluded that it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." 791 S. W. 2d, at 18.

The court determined that the prosecutor's comments during closing argument were "relevant to [Payne's] personal responsibility and moral guilt." *Id.*, at 19. The court explained that "[w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his 'blameworthiness.'" The court concluded that any violation of Payne's rights under *Booth* and *Gathers* "was harmless beyond a reasonable doubt." *Ibid.*

We granted certiorari, 498 U. S. 1080 (1991), to reconsider our holdings in *Booth* and *Gathers* that the Eighth Amendment prohibits a capital sentencing jury from considering "victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.

In *Booth*, the defendant robbed and murdered an elderly couple. As required by a state statute, a victim impact statement was prepared based on interviews with the victims' son, daughter, son-in-law, and granddaughter. The statement, which described the personal characteristics of the victims, the emotional impact of the crimes on the family, and set forth the family members' opinions and characterizations of the crimes and the defendant, was submitted to the jury at sentencing. The jury imposed the death penalty. The conviction and sentence were affirmed on appeal by the State's highest court.

This Court held by a 5-to-4 vote that the Eighth Amendment prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial. The Court

made clear that the admissibility of victim impact evidence was not to be determined on a case-by-case basis, but that such evidence was *per se* inadmissible in the sentencing phase of a capital case except to the extent that it "relate[d] directly to the circumstances of the crime." 482 U. S., at 507, n. 10. In *Gathers*, decided two years later, the Court extended the rule announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

The *Booth* Court began its analysis with the observation that the capital defendant must be treated as a "'uniquely individual human bein[g],'" 482 U. S., at 504 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)), and therefore the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the "'character of the individual and the circumstances of the crime.'" 482 U. S., at 502 (quoting *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983)). The Court concluded that while no prior decision of this Court had mandated that only the defendant's character and immediate characteristics of the crime may constitutionally be considered, other factors are irrelevant to the capital sentencing decision unless they have "some bearing on the defendant's 'personal responsibility and moral guilt.'" 482 U. S., at 502 (quoting *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982)). To the extent that victim impact evidence presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," the Court concluded, it has nothing to do with the "blameworthiness of a particular defendant." 482 U. S., at 504, 505. Evidence of the victim's character, the Court observed, "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." The Court concluded that, except to the extent that victim impact evidence relates "di-

rectly to the circumstances of the crime," *id.*, at 507, and n. 10, the prosecution may not introduce such evidence at a capital sentencing hearing because "it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner," *id.*, at 505.

Booth and *Gathers* were based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do not in general reflect on the defendant's "blameworthiness," and that only evidence relating to "blameworthiness" is relevant to the capital sentencing decision. However, the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth*, 482 U. S., at 519 (SCALIA, J., dissenting). The same is true with respect to two defendants, each of whom participates in a robbery, and each of whom acts with reckless disregard for human life; if the robbery in which the first defendant participated results in the death of a victim, he may be subjected to the death penalty, but if the robbery in which the second defendant participates does not result in the death of a victim, the death penalty may not be imposed. *Tison* v. *Arizona*, 481 U. S. 137, 148 (1987).

The principles which have guided criminal sentencing—as opposed to criminal liability—have varied with the times. The book of Exodus prescribes the *Lex talionis*, "An eye for an eye, a tooth for a tooth." Exodus 21: 22–23. In England and on the continent of Europe, as recently as the 18th century, crimes which would be regarded as quite minor today

were capital offenses. Writing in the 18th century, the Italian criminologist Cesare Beccaria advocated the idea that "the punishment should fit the crime." He said that "[w]e have seen that the true measure of crimes is the injury done to society." J. Farrer, Crimes and Punishments 199 (1880).

Gradually the list of crimes punishable by death diminished, and legislatures began grading the severity of crimes in accordance with the harm done by the criminal. The sentence for a given offense, rather than being precisely fixed by the legislature, was prescribed in terms of a minimum and a maximum, with the actual sentence to be decided by the judge. With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the "indeterminate sentence," where the time of incarceration was left almost entirely to the penological authorities rather than to the courts. But more recently the pendulum has swung back. The Federal Sentencing Guidelines, which went into effect in 1987, provided for very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his acts.

Wherever judges in recent years have had discretion to impose sentence, the consideration of the harm caused by the crime has been an important factor in the exercise of that discretion:

> "The first significance of harm in Anglo-American jurisprudence is, then, as a prerequisite to the criminal sanction. The second significance of harm—one no less important to judges—is as a measure of the seriousness of the offense and therefore as a standard for determining the severity of the sentence that will be meted out." S. Wheeler, K. Mann, & A. Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals 56 (1988).

Whatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of

relevant material. *Williams* v. *New York*, 337 U. S. 241 (1949). In the federal system, we observed that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). Even in the context of capital sentencing, prior to *Booth* the joint opinion of Justices Stewart, Powell, and STEVENS in *Gregg* v. *Georgia*, 428 U. S. 153, 203–204 (1976), had rejected petitioner's attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentence hearings." The joint opinion stated:

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

The Maryland statute involved in *Booth* required that the presentence report in all felony cases include a "victim impact statement" which would describe the effect of the crime on the victim and his family. *Booth*, *supra*, at 498. Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. The evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect were much the same as if it had been. While the admission of this particular kind of evidence—designed to portray for the sentencing authority the actual harm caused by a particular crime—is of recent origin, this fact hardly renders it unconstitutional. *Williams* v. *Florida*, 399 U. S. 78 (1970) (upholding the constitutionality of a

notice-of-alibi statute, of a kind enacted by at least 15 States dating from 1927); *United States* v. *DiFrancesco*, 449 U. S. 117, 142 (1980) (upholding against a double jeopardy challenge an Act of Congress representing "a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges 'to mete out light sentences in cases involving organized crime management personnel'").

We have held that a State cannot preclude the sentencer from considering "any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death. *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982). See also *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). Thus we have, as the Court observed in *Booth*, required that the capital defendant be treated as a "'uniquely individual human bein[g],'" 482 U. S., at 504 (quoting *Woodson* v. *North Carolina*, 428 U. S., at 304). But it was never held or even suggested in any of our cases preceding *Booth* that the defendant, entitled as he was to individualized consideration, was to receive that consideration wholly apart from the crime which he had committed. The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received. Any doubt on the matter is dispelled by comparing the language in *Woodson* with the language from *Gregg* v. *Georgia*, quoted above, which was handed down the same day as *Woodson*. This misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," *Mills* v. *Maryland*, 486 U. S. 367, 397 (1988) (REHNQUIST, C. J., dissenting), or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

The *Booth* Court reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a "'mini-trial' on the victim's character." *Booth*, *supra*, at 506–507. In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, "the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Barefoot* v. *Estelle*, 463 U. S. 880, 898 (1983).

Payne echoes the concern voiced in *Booth*'s case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. *Booth*, *supra*, at 506, n. 8. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. The facts of *Gathers* are an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, per-

haps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States. The state laws respecting crimes, punishments, and criminal procedure are, of course, subject to the overriding provisions of the United States Constitution. Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process.

> "First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey* v. *Kemp*, 481 U. S. 279, 305–306 (1987).

But, as we noted in *California* v. *Ramos*, 463 U. S. 992, 1001 (1983), "[b]eyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination."

"Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone* v. *Pennsylvania*, 494 U. S. 299, 309 (1990). The States remain free, in capital cases, as well as others, to

devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See *Darden* v. *Wainwright*, 477 U. S. 168, 179–183 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U. S., at 517 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U. S., at 821 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

The present case is an example of the potential for such unfairness. The capital sentencing jury heard testimony from

Payne's girlfriend that they met at church; that he was affectionate, caring, and kind to her children; that he was not an abuser of drugs or alcohol; and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne's brutal crimes. In contrast, the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's description—in response to a single question—that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury's death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant. The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by *Booth* when it said: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." 791 S. W. 2d, at 19.

In *Gathers*, as indicated above, we extended the holding of *Booth* barring victim impact evidence to the prosecutor's argument to the jury. Human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury's verdict. Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting

on his individual personality, and the defendant's attorney may argue that evidence to the jury. Petitioner's attorney in this case did just that. For the reasons discussed above, we now reject the view—expressed in *Gathers*—that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands convicted. We reaffirm the view expressed by Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934): "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne and his *amicus* argue that despite these numerous infirmities in the rule created by *Booth* and *Gathers*, we should adhere to the doctrine of *stare decisis* and stop short of overruling those cases. *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944).

Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, at 407 (Brandeis, J., dissenting). Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965); *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977); *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, at 405–411 (Brandeis, J., dissenting); *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472 (1924); *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 458 (1852); the opposite is true in cases such as the present one involving procedural and evidentiary rules.

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions.[1] *Booth* and *Gathers* were de-

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[1] *Perez* v. *Campbell*, 402 U. S. 637 (1971) (overruling *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962)); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972) (overruling *Pope* v. *Williams*, 193 U. S. 621 (1904)); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973) (overruling *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1928)); *Miller* v. *California*, 413 U. S. 15 (1973) (overruling *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U. S. 413 (1966)); *North Dakota Pharmacy Bd.* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156 (1973) (overruling *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928)); *Edelman* v. *Jordan*, 415 U. S. 651 (1974) (overruling in part *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *State Dept. of Health & Rehabilitative Services of Florida* v. *Zarate*, 407 U. S. 918 (1972); and *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U. S. 809 (1972)); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975) (overruling in effect *Hoyt* v. *Florida*, 368 U. S. 57 (1961)); *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (overruling *Low* v. *Austin*, 13 Wall. 29 (1872)); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) (overruling *Valentine* v. *Chrestensen*, 316 U. S. 52

cided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later

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(1942)); *National League of Cities* v. *Usery*, 426 U. S. 833 (1976) (overruling *Maryland* v. *Wirtz*, 392 U. S. 183 (1968)); *New Orleans* v. *Dukes*, 427 U. S. 297 (1976) (overruling *Morey* v. *Doud*, 354 U. S. 457 (1957)); *Craig* v. *Boren*, 429 U. S. 190 (1976) (overruling *Goesaert* v. *Cleary*, 335 U. S. 464 (1948)); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977) (overruling *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951)); *Shaffer* v. *Heitner*, 433 U. S. 186 (1977) (overruling *Pennoyer* v. *Neff*, 95 U. S. 714 (1878)); *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U. S. 734 (1978) (overruling *Puget Sound Stevedoring Co.* v. *State Tax Comm'n*, 302 U. S. 90 (1937)); *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (overruling *Geer* v. *Connecticut*, 161 U. S. 519 (1896)); *United States* v. *Salvucci*, 448 U. S. 83 (1980) (overruling *Jones* v. *United States*, 362 U. S. 257 (1960)); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981) (overruling *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922)); *Illinois* v. *Gates*, 462 U. S. 213 (1983) (overruling *Aguilar* v. *Texas*, 378 U. S. 108 (1964)); *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984) (overruling in part *Rolston* v. *Missouri Fund Comm'rs*, 120 U. S. 390 (1887)); *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984) (overruling *Coffey* v. *United States*, 116 U. S. 436 (1886)); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (overruling *National League of Cities* v. *Usery*, *supra*); *United States* v. *Miller*, 471 U. S. 130 (1985) (overruling in part *Ex parte Bain*, 121 U. S. 1 (1887)); *Daniels* v. *Williams*, 474 U. S. 327 (1986) (overruling in part *Parratt* v. *Taylor*, 451 U. S. 527 (1981)); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (overruling in part *Swain* v. *Alabama*, 380 U. S. 202 (1965)); *Solorio* v. *United States*, 483 U. S. 435 (1987) (overruling *O'Callahan* v. *Parker*, 395 U. S. 258 (1969)); *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468 (1987) (overruling in part *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184 (1964)); *South Carolina* v. *Baker*, 485 U. S. 505 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895)); *Thornburgh* v. *Abbott*, 490 U. S. 401 (1989) (overruling in part *Procunier* v. *Martinez*, 416 U. S. 396 (1974)); *Alabama* v. *Smith*, 490 U. S. 794 (1989) (overruling *Simpson* v. *Rice* (decided with *North Carolina* v. *Pearce*), 395 U. S. 711 (1969)); *Healy* v. *Beer Institute*, 491 U. S. 324 (1989) (overruling *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966)); *Collins* v. *Youngblood*, 497 U. S. 37 (1990)

decisions and have defied consistent application by the lower courts. See *Gathers*, 490 U. S., at 813 (O'CONNOR, J., dissenting); *Mills* v. *Maryland*, 486 U. S., at 395–396 (REHNQUIST, C. J., dissenting). See also *State* v. *Huertas*, 51 Ohio St. 3d 22, 33, 553 N. E. 2d 1058, 1070 (1990) ("The fact that the majority and two dissenters in this case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area") (Moyer, C. J., concurring). Reconsidering these decisions now, we conclude, for the reasons heretofore stated, that they were wrongly decided and should be, and now are, overruled.[2] We accordingly affirm the judgment of the Supreme Court of Tennessee.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE WHITE and JUSTICE KENNEDY join, concurring.

In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills* v. *Maryland*, 486 U. S. 367, 397 (1988) (REHN-

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(overruling *Kring* v. *Missouri*, 107 U. S. 221 (1883); *Thompson* v. *Utah*, 170 U. S. 343 (1898)); *California* v. *Acevedo*, 500 U. S. 565 (1991) (overruling *Arkansas* v. *Sanders*, 442 U. S. 753 (1979)).

[2] Our holding today is limited to the holdings of *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

QUIST, C. J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

Given that victim impact evidence is potentially relevant, nothing in the Eighth Amendment commands that States treat it differently than other kinds of relevant evidence. "The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed 'cruel and unusual.'" *South Carolina* v. *Gathers*, 490 U. S. 805, 821 (1989) (O'CONNOR, J., dissenting). Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted legislation enabling judges and juries to consider victim impact evidence. *Ante*, at 821. The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.

We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante*, at 827. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they

did not come home. I do not doubt that the jurors were moved by this testimony—who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived—only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.

Nor did the prosecutor's comments about Charisse and Lacie in the closing argument violate the Constitution. The jury had earlier seen a videotape of the murder scene that included the slashed and bloody corpses of Charisse and Lacie. In arguing that Payne deserved the death penalty, the prosecutor sought to remind the jury that Charisse and Lacie were more than just lifeless bodies on a videotape, that they were unique human beings. The prosecutor remarked that Charisse would never again sing a lullaby to her son and that Lacie would never attend a high school prom. In my view, these statements were permissible. "Murder is the ultimate act of depersonalization." Brief for Justice For All Political Committee et al. as *Amici Curiae* 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

I agree with the Court that *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *Gathers*, *supra*, were wrongly decided. The Eighth Amendment does not prohibit a State from choosing to admit evidence concerning a murder victim's personal characteristics or the impact of the crime on the victim's fam-

ily and community. *Booth* also addressed another kind of victim impact evidence—opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial. *Ante*, at 830, n. 2. Nor do we express an opinion as to other aspects of the prosecutor's conduct. As to the victim impact evidence that was introduced, its admission did not violate the Constitution. Accordingly, I join the Court's opinion.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join as to Part II, concurring.

I

The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence, see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). I have previously expressed my belief that the latter requirement is both wrong and, when combined with the remainder of our capital sentencing jurisprudence, unworkable. See *Walton* v. *Arizona*, 497 U. S. 639, 671–673 (1990) (opinion concurring in part and concurring in judgment). Even if it were abandoned, however, I would still affirm the judgment here. True enough, the Eighth Amendment permits parity between mitigating and aggravating factors. But more broadly and fundamentally still, it permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime.

II

The response to JUSTICE MARSHALL's strenuous defense of the virtues of *stare decisis* can be found in the writings of JUSTICE MARSHALL himself. That doctrine, he has re-

minded us, "is not 'an imprisonment of reason.'" *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, 618 (1983) (dissenting opinion) (quoting *United States* v. *International Boxing Club of N. Y., Inc.*, 348 U. S. 236, 249 (1955) (Frankfurter, J., dissenting)). If there was ever a case that defied reason, it was *Booth* v. *Maryland*, 482 U. S. 496 (1987), imposing a constitutional rule that had absolutely no basis in constitutional text, in historical practice, or in logic. JUSTICE MARSHALL has also explained that "'[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.'" *Flood* v. *Kuhn*, 407 U. S. 258, 293, n. 4 (1972) (dissenting opinion) (quoting Szanton, Stare Decisis; A Dissenting View, 10 Hastings L. J. 394, 397 (1959)) (internal quotation marks omitted). *Booth*'s stunning *ipse dixit*, that a crime's unanticipated consequences must be deemed "irrelevant" to the sentence, 482 U. S., at 503, conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victims' rights" movement.

Today, however, JUSTICE MARSHALL demands of us some "special justification"—*beyond* the mere conviction that the rule of *Booth* significantly harms our criminal justice system and is egregiously wrong—before we can be absolved of exercising "[p]ower, not reason." *Post*, at 844. I do not think that is fair. In fact, quite to the contrary, what would enshrine power as the governing principle of this Court is the notion that an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes.

It seems to me difficult for those who were in the majority in *Booth* to hold themselves forth as ardent apostles of *stare decisis*. That doctrine, to the extent it rests upon anything more than administrative convenience, is merely the applica-

tion to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth*, and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins, concurring.

I join the Court's opinion addressing two categories of facts excluded from consideration at capital sentencing proceedings by *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989): information revealing the individuality of the victim and the impact of the crime on the victim's survivors.[1] As to these two categories, I believe *Booth* and *Gathers* were wrongly decided.

To my knowledge, our legal tradition has never included a general rule that evidence of a crime's effects on the victim and others is, standing alone, irrelevant to a sentencing determination of the defendant's culpability. Indeed, as the Court's opinion today, see *ante*, at 819–821, and dissents in *Booth*, *supra*, at 519–520 (opinion of SCALIA, J.) and *Gathers*, *supra*, at 817–820 (opinion of O'CONNOR, J.), make clear, criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically

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[1] This case presents no challenge to the Court's holding in *Booth* v. *Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence. See *ante*, at 830, n. 2.

intended, but determined in part by conditions unknown to a defendant when he acted. The majority opinion in *Booth*, *supra*, at 502–503, nonetheless characterized the consideration in a capital sentencing proceeding of a victim's individuality and the consequences of his death on his survivors as "irrelevant" and productive of "arbitrary and capricious" results, insofar as that would allow the sentencing authority to take account of information not specifically contemplated by the defendant prior to his ultimate criminal decision. This condemnation comprehends two quite separate elements. As to one such element, the condemnation is merited but insufficient to justify the rule in *Booth*, and as to the other it is mistaken.

Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry* v. *Lynaugh*, 492 U. S. 302, 319–328 (1989) (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring)); *Gholson* v. *Estelle*, 675 F. 2d 734, 738 (CA5 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. See *Darden* v. *Wainwright*, 477 U. S. 168, 178–183 (1986) (due process standard of fundamental fairness governs argument of prosecutor at sentencing); *United States* v. *Serhant*, 740 F. 2d 548, 551–552 (CA7 1984) (applying due process to purportedly "inflammatory" victim impact statements); see also *Lesko* v. *Lehman*, 925 F. 2d 1527, 1545–1547 (CA3 1991); *Coleman* v. *Saffle*, 869 F. 2d 1377, 1394–1396 (CA10 1989), cert. denied, 494 U. S. 1090

(1990); *Rushing* v. *Butler*, 868 F. 2d 800, 806–807 (CA5 1989). With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987).

Booth, *supra*,[2] nonetheless goes further and imposes a blanket prohibition on consideration of evidence of the victim's individuality and the consequential harm to survivors as irrelevant to the choice between imprisonment and execution, except when such evidence goes to the "circumstances of the crime," *id.*, at 502, and probably then only when the facts in question were known to the defendant and relevant to his decision to kill, *id.*, at 505. This prohibition rests on the belief that consideration of such details about the victim and survivors as may have been outside the defendant's knowledge is inconsistent with the sentencing jury's Eighth Amendment duty "in the unique circumstance of a capital sentencing hearing . . . to focus on the defendant as a 'uniquely individual human bein[g].'" *Id.*, at 504 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.)). The assumption made is that the obligation to consider the defendant's uniqueness limits the data about a crime's impact, on which a defendant's moral guilt may be calculated, to the facts he specifically knew and presumably considered. His uniqueness, in other words, is defined by the specifics of his knowledge and the reasoning that is thought to follow from it.

To hold, however, that in setting the appropriate sentence a defendant must be considered in his uniqueness is not to require that only unique qualities be considered. While a defendant's anticipation of specific consequences to the victims of his intended act is relevant to sentencing, such detailed

[2] Because this discussion goes only to the underlying substantive rule in question, for brevity I will confine most references to *Booth* alone.

foreknowledge does not exhaust the category of morally relevant fact. One such fact that is known to all murderers and relevant to the blameworthiness of each one was identified by the *Booth* majority itself when it barred the sentencing authority in capital cases from considering "the full range of foreseeable consequences of a defendant's actions." 482 U. S., at 504. Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

That foreseeability of the killing's consequences imbues them with direct moral relevance, cf. *Penry* v. *Lynaugh*, *supra*, at 328 (death penalty should be "'reasoned moral response'"), and evidence of the specific harm caused when a homicidal risk is realized is nothing more than evidence of the risk that the defendant originally chose to run despite the

kinds of consequences that were obviously foreseeable. It is morally both defensible and appropriate to consider such evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge entails. Any failure to take account of a victim's individuality and the effects of his death upon close survivors would thus more appropriately be called an act of lenity than their consideration an invitation to arbitrary sentencing. Indeed, given a defendant's option to introduce relevant evidence in mitigation, see, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), sentencing without such evidence of victim impact may be seen as a significantly imbalanced process. See *Mills* v. *Maryland*, 486 U. S. 367, 397 (1988) (REHNQUIST, C. J., dissenting).

I so view the relevance of the two categories of victim impact evidence at issue here, and I fully agree with the majority's conclusion, and the opinions expressed by the dissenters in *Booth* and *Gathers*, that nothing in the Eighth Amendment's condemnation of cruel and unusual punishment would require that evidence to be excluded. See *ante*, at 827 ("[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar"); *Booth*, *supra*, at 515–516 (WHITE, J., dissenting) (nothing "'cruel or unusual' or otherwise unconstitutional about the legislature's decision to use victim impact statements in capital sentencing hearings"); *Gathers*, 490 U. S., at 816–821 (O'CONNOR, J., dissenting); *id.*, at 823–825 (SCALIA, J., dissenting).

I do not, however, rest my decision to overrule wholly on the constitutional error that I see in the cases in question. I must rely as well on my further view that *Booth* sets an unworkable standard of constitutional relevance that threatens, on its own terms, to produce such arbitrary consequences and uncertainty of application as virtually to guarantee a result far diminished from the case's promise of appropriately

individualized sentencing for capital defendants. 482 U. S., at 502. These conclusions will be seen to result from the interaction of three facts. First, although *Booth* was prompted by the introduction of a systematically prepared "victim impact statement" at the sentencing phase of the trial, *Booth*'s restriction of relevant facts to what the defendant knew and considered in deciding to kill applies to any evidence, however derived or presented. Second, details of which the defendant was unaware, about the victim and survivors, will customarily be disclosed by the evidence introduced at the guilt phase of the trial. Third, the jury that determines guilt will usually determine, or make recommendations about, the imposition of capital punishment.

A hypothetical case will illustrate these facts and raise what I view as the serious practical problems with application of the *Booth* standard. Assume that a minister, unidentified as such and wearing no clerical collar, walks down a street to his church office on a brief errand, while his wife and adolescent daughter wait for him in a parked car. He is robbed and killed by a stranger, and his survivors witness his death. What are the circumstances of the crime that can be considered at the sentencing phase under *Booth?* The defendant did not know his victim was a minister, or that he had a wife and child, let alone that they were watching. Under *Booth*, these facts were irrelevant to his decision to kill, and they should be barred from consideration at sentencing. Yet evidence of them will surely be admitted at the guilt phase of the trial. The widow will testify to what she saw, and, in so doing, she will not be asked to pretend that she was a mere bystander. She could not succeed at that if she tried. The daughter may well testify too. The jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church. This is so not only because the widow will not try to deceive the jury about her relationship, but also because the usual standards of trial relevance afford factfinders enough information about

surrounding circumstances to let them make sense of the narrowly material facts of the crime itself. No one claims that jurors in a capital case should be deprived of such common contextual evidence, even though the defendant knew nothing about the errand, the victim's occupation, or his family. And yet, if these facts are not kept from the jury at the guilt stage, they will be in the jurors' minds at the sentencing stage.

Booth thus raises a dilemma with very practical consequences. If we were to require the rules of guilt-phase evidence to be changed to guarantee the full effect of *Booth*'s promise to exclude consideration of specific facts unknown to the defendant and thus supposedly without significance in morally evaluating his decision to kill, we would seriously reduce the comprehensibility of most trials by depriving jurors of those details of context that allow them to understand what is being described. If, on the other hand, we are to leave the rules of trial evidence alone, *Booth*'s objective will not be attained without requiring a separate sentencing jury to be empaneled. This would be a major imposition on the States, however, and I suppose that no one would seriously consider adding such a further requirement.

But, even if *Booth* were extended one way or the other to exclude completely from the sentencing proceeding all facts about the crime's victims not known by the defendant, the case would be vulnerable to the further charge that it would lead to arbitrary sentencing results. In the preceding hypothetical, *Booth* would require that all evidence about the victim's family, including its very existence, be excluded from sentencing consideration because the defendant did not know of it when he killed the victim. Yet, if the victim's daughter had screamed "Daddy, look out," as the defendant approached the victim with drawn gun, then the evidence of at least the daughter's survivorship would be admissible even under a strict reading of *Booth*, because the defendant, prior to killing, had been made aware of the daughter's existence,

which therefore became relevant in evaluating the defendant's decision to kill. Resting a decision about the admission of impact evidence on such a fortuity is arbitrary.

Thus, the status quo is unsatisfactory, and the question is whether the case that has produced it should be overruled. In this instance, as in any other, overruling a precedent of this Court is a matter of no small import, for "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 494 (1987). To be sure, *stare decisis* is not an "inexorable command," *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting); and our "considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962). See *Burnet*, *supra*, at 405–407; *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). But, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

The Court has a special justification in this case. *Booth* promises more than it can deliver, given the unresolved tension between common evidentiary standards at the guilt phase and *Booth*'s promise of a sentencing determination free from the consideration of facts unknown to the defendant and irrelevant to his decision to kill. An extension of the case to guarantee a sentencing authority free from the influence of information extraneous under *Booth* would be either an unworkable or a costly extension of an erroneous principle and would itself create a risk of arbitrary results. There is only one other course open to us. We can recede from the erroneous holding that created the tension and extended the false promise, and there is precedent in our *stare decisis* jurisprudence for doing just this. In prior cases, when this Court has confronted a wrongly decided, unworkable

precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent. See *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965);[3] *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977);[4] see also *Patterson* v. *McLean Credit*

[3] In *Swift & Co.* v. *Wickham*, the Court overruled *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962). The issue presented in both *Swift* and *Kesler* concerned the application of the three-judge district court statute, 28 U. S. C. § 2281 (1970 ed.), in cases of alleged state statutory pre-emption by federal law. The Court had held in *Kesler* that "§ 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated." 382 U. S., at 115.

Three years later in *Swift & Co.* v. *Wickham*, a majority of the Court disagreed with the *Kesler* analysis of the question, finding it inconsistent with the statute and earlier precedents of this Court. 382 U. S., at 122 ("The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281"). The Court concluded that there were

"[t]wo possible interpretations of § 2281 [that] would provide a more practical rule for three-judge court jurisdiction. The first is that *Kesler* might be extended to hold, as some of its language might be thought to indicate, that *all* suits to enjoin the enforcement of a state statute, whatever the federal ground, must be channeled through three-judge courts. The second is that *no* such suits resting solely on 'supremacy' grounds fall within the statute." *Id.*, at 125 (footnote omitted).

Rather than extend the incorrectly decided opinion in *Kesler*, the Court decided to overrule it. 382 U. S., at 126–127.

[4] In *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, the Court overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), which had held that "[u]nder the Sherman Act, it is *[per se]* unreasonable . . . for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id.*, at 379. The decision distinguished between restrictions on retailers based on whether the underlying transaction was a sale, in which case the Court applied a *per se* ban, or not a sale, in which case the arrangement would be subject to a "rule of reason" analysis. In *Continental T. V., Inc.*, the Court reconsidered this *per se* rule in light of our traditional reliance on a "rule of reason" analysis for § 1 claims under the Sherman Act and the "continuing controversy and confusion, both in the

Union, *supra*, at 173. Following this course here has itself the support not only of precedent but of practical sense as well. Therefore, I join the Court in its partial overruling of *Booth* and *Gathers*.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, dissenting.

Power, not reason, is the new currency of this Court's decisionmaking. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. *Booth* v. *Maryland*, 482 U. S. 496 (1987). By another 5–4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. *South Carolina* v. *Gathers*, 490 U. S. 805 (1989). Nevertheless, having expressly invited respondent to renew the attack, 498 U. S. 1076 (1991), today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.

In dispatching *Booth* and *Gathers* to their graves, today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store. Renouncing this Court's historical commitment to a conception of "the judiciary as a source of impersonal and reasoned judgments," *Moragne* v. *States Marine Lines*, 398 U. S. 375, 403 (1970),

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scholarly journals and in the federal courts" caused by the sale/nonsale distinction drawn by the Court in *Schwinn*. 433 U. S., at 47–56. The Court proceeded to reexamination and concluded "that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason." *Id.*, at 57. The Court found "no persuasive support for expanding the *per se* rule," and *Schwinn* was overruled. 433 U. S., at 57.

the majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case. Because I believe that this Court owes more to its constitutional precedents in general and to *Booth* and *Gathers* in particular, I dissent.

I

Speaking for the Court as then constituted, Justice Powell and Justice Brennan set out the rationale for excluding victim-impact evidence from the sentencing proceedings in a capital case. See *Booth* v. *Maryland*, *supra*, at 504–509; *South Carolina* v. *Gathers*, *supra*, at 810–811. As the majorities in *Booth* and *Gathers* recognized, the core principle of this Court's capital jurisprudence is that the sentence of death must reflect an "'*individualized* determination'" of the defendant's "'personal responsibility and moral guilt'" and must be based upon factors that channel the jury's discretion "'so as to minimize the risk of wholly arbitrary and capricious action.'" *Booth* v. *Maryland*, *supra*, at 502, quoting *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983); *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), and *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); accord, *South Carolina* v. *Gathers*, *supra*, at 810. The State's introduction of victim-impact evidence, Justice Powell and Justice Brennan explained, violates this fundamental principle. Where, as is ordinarily the case, the defendant was unaware of the personal circumstances of his victim, admitting evidence of the victim's character and the impact of the murder upon the victim's family predicates the sentencing determination on "factors . . . wholly unrelated to the

blameworthiness of [the] particular defendant." *Booth* v. *Maryland*, *supra*, at 504; *South Carolina* v. *Gathers*, *supra*, at 810. And even where the defendant *was* in a position to foresee the likely impact of his conduct, admission of victim-impact evidence creates an unacceptable risk of sentencing arbitrariness. As Justice Powell explained in *Booth*, the probative value of such evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community. See *Booth* v. *Maryland*, *supra*, at 505–507, and n. 8; *South Carolina* v. *Gathers*, *supra*, at 810–811. I continue to find these considerations wholly persuasive, and I see no purpose in trying to improve upon Justice Powell's and Justice Brennan's exposition of them.

There is nothing new in the majority's discussion of the supposed deficiencies in *Booth* and *Gathers*. Every one of the arguments made by the majority can be found in the dissenting opinions filed in those two cases, and, as I show in the margin, each argument was convincingly answered by Justice Powell and Justice Brennan.[1]

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[1] The majority's primary argument is that punishment in criminal law is frequently based on an "assessment of [the] harm caused by the defendant as a result of the crime charged." *Ante*, at 819. See also *Booth* v. *Maryland*, 482 U. S. 496, 516 (1987) (WHITE, J., dissenting); *id.*, at 519–520 (SCALIA, J., dissenting); *South Carolina* v. *Gathers*, 490 U. S. 805, 818–819 (1989) (O'CONNOR, J., dissenting). Nothing in *Booth* or *Gathers*, however, conflicts with this unremarkable observation. These cases stand merely for the proposition that the State may not put on evidence of *one* particular species of harm—namely, that associated with the victim's personal characteristics independent of the circumstances of the offense—in the course of *a capital murder proceeding*. See *Booth* v. *Maryland*, *supra*, at 507, n. 10 (emphasizing that decision does not bar reliance on victim-impact evidence in capital sentencing so long as such evidence "relate[s] directly to the circumstances of the crime"); *id.*, at 509, n. 12 (emphasizing that decision does not bar reliance on victim-impact evidence

But contrary to the impression that one might receive from reading the majority's lengthy rehearsing of the issues addressed in *Booth* and *Gathers*, the outcome of this case does

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in sentencing for noncapital crimes). It may be the case that such a rule departs from the latitude of sentencers in criminal law generally to "tak[e] into consideration the harm done by the defendant." *Ante*, at 825. But as the *Booth* Court pointed out, because this Court's capital-sentencing jurisprudence is founded on the premise that "death is a 'punishment different from all other sanctions,'" it is completely unavailing to attempt to infer from sentencing considerations in noncapital settings the proper treatment of any particular sentencing issue in a capital case. 482 U. S., at 509, n. 12, quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

The majority also discounts Justice Powell's concern with the inherently prejudicial quality of victim-impact evidence. "[T]he mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence," the majority protests, "makes the case no different than others in which a party is faced with this sort of a dilemma." *Ante*, at 823. See also *Booth* v. *Maryland*, *supra*, at 518 (WHITE, J., dissenting). Unsurprisingly, this tautology is completely unresponsive to Justice Powell's argument. The *Booth* Court established a rule excluding introduction of victim-impact evidence not merely because it is difficult to rebut—a feature of victim-impact evidence that may be "no different" from that of many varieties of relevant, legitimate evidence—but because the effect of this evidence in the sentencing proceeding is *unfairly prejudicial*: "The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." 482 U. S., at 507. The law is replete with *per se* prohibitions of types of evidence the probative effect of which is generally outweighed by its unfair prejudice. See, *e. g.*, Fed. Rules Evid. 404, 407–412. There is nothing anomalous in the notion that the Eighth Amendment would similarly exclude evidence that has an undue capacity to undermine the regime of individualized sentencing that our capital jurisprudence demands.

Finally, the majority contends that the exclusion of victim-impact evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Ante*, at 825. The majority's recycled contention, see *Booth*, *supra*, at 517 (WHITE, J.,

not turn simply on who—the *Booth* and *Gathers* majorities or the *Booth* and *Gathers* dissenters—had the better of the argument. Justice Powell and Justice Brennan's position carried the day in those cases and became the law of the land. The real question, then, is whether today's majority has come forward with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents. In my view, the majority clearly has not made any such showing. Indeed, the striking feature of the majority's opinion is its radical assertion that it need not even try.

II

The overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of *stare decisis* is not an "inexorable command," *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) (Brandeis, J., dissenting), this Court has repeatedly stressed that fidelity to precedent is fundamental to "a society governed by the rule of law," *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). See generally *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon

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dissenting); *id.*, at 520 (SCALIA, J., dissenting); *Gathers*, *supra*, at 817–818 (O'CONNOR, J., dissenting), begs the question. Before it is possible to conclude that the exclusion of victim-impact evidence prevents the State from making its case or the jury from considering relevant evidence, it is necessary to determine whether victim-impact evidence is consistent with the substantive standards that define the scope of permissible sentencing determinations under the Eighth Amendment. The majority offers no persuasive answer to Justice Powell and Justice Brennan's conclusion that victim-impact evidence is frequently *irrelevant* to any permissible sentencing consideration and that such evidence risks exerting *illegitimate* "moral force" by directing the jury's attention on illicit considerations such as the victim's standing in the community.

'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)"); *Appeal of Concerned Corporators of Portsmouth Savings Bank*, 129 N. H. 183, 227, 525 A. 2d 671, 701 (1987) (Souter, J., dissenting) ("*[S]tare decisis* . . . 'is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results,'" quoting *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 786–787 (1986) (WHITE, J., dissenting)).

Consequently, this Court has never departed from precedent without "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). Such justifications include the advent of "subsequent changes or development in the law" that undermine a decision's rationale, *Patterson* v. *McLean Credit Union*, *supra*, at 173; the need "to bring [a decision] into agreement with experience and with facts newly ascertained," *Burnet* v. *Coronado Oil & Gas Co.*, *supra*, at 412 (Brandeis, J., dissenting); and a showing that a particular precedent has become a "detriment to coherence and consistency in the law," *Patterson* v. *McLean Credit Union*, *supra*, at 173.

The majority cannot seriously claim that *any* of these traditional bases for overruling a precedent applies to *Booth* or *Gathers*. The majority does not suggest that the legal rationale of these decisions has been undercut by changes or developments in doctrine during the last two years. Nor does the majority claim that experience over that period of time has discredited the principle that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion), the larger postulate of political morality on which *Booth* and *Gathers* rest.

The majority does assert that *Booth* and *Gathers* "have defied consistent application by the lower courts," *ante*, at 830,

but the evidence that the majority proffers is so feeble that the majority cannot sincerely expect anyone to believe this claim. To support its contention, the majority points to JUSTICE O'CONNOR's dissent in *Gathers*, which noted a division among lower courts over whether *Booth* prohibited prosecutorial arguments relating to the victim's personal characteristics. See 490 U. S., at 813. That, of course, was the issue expressly considered and resolved in *Gathers*. The majority also cites THE CHIEF JUSTICE's dissent in *Mills* v. *Maryland*, 486 U. S. 367, 395–398 (1988). That opinion does not contain a *single word* about any supposed "[in]consistent application" of *Booth* in the lower courts. Finally, the majority refers to a divided Ohio Supreme Court decision disposing of an issue concerning victim-impact evidence. See *State* v. *Huertas*, 51 Ohio St. 3d 22, 553 N. E. 2d 1058 (1990), cert. dism'd as improvidently granted, 498 U. S. 336 (1991). Obviously, if a division among the members of a single lower court in a single case were sufficient to demonstrate that a particular precedent was a "detriment to coherence and consistency in the law," *Patterson* v. *McLean Credit Union*, *supra*, at 173, there would hardly be a decision in United States Reports that we would not be obliged to reconsider.

It takes little real detective work to discern just what *has* changed since this Court decided *Booth* and *Gathers*: this Court's own personnel. Indeed, the majority candidly explains why this particular contingency, which until now has been almost universally understood *not* to be sufficient to warrant overruling a precedent, see, *e. g.*, *Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 153 (1981) (STEVENS, J., concurring); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 636 (1974) (Stewart, J., dissenting); *Mapp* v. *Ohio*, 367 U. S. 643, 677 (1961) (Harlan, J., dissenting); but see *South Carolina* v. *Gathers*, *supra*, at 824 (SCALIA, J., dissenting), *is* sufficient to justify overruling *Booth* and *Gathers*. "Considerations in favor of *stare decisis* are at their acme," the majority explains, "in

cases involving property and contract rights, where reliance interests are involved[;] the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Ante*, at 828 (citations omitted). In addition, the majority points out, "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents" and thereafter were "questioned by Members of the Court." *Ante*, at 828–829. Taken together, these considerations make it legitimate, in the majority's view, to elevate the position of the *Booth* and *Gathers* dissenters into the law of the land.

This truncation of the Court's duty to stand by its own precedents is astonishing. By limiting full protection of the doctrine of *stare decisis* to "cases involving property and contract rights," *ante*, at 828, the majority sends a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination. Taking into account the majority's additional criterion for overruling—that a case either was decided or reaffirmed by a 5–4 margin "over spirited dissen[t]," *ante*, at 829—the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court. See, *e. g.*, *Metro Broadcasting* v. *FCC*, 497 U. S. 547 (1990) (authority of Federal government to set aside broadcast licenses for minority applicants); *Grady* v. *Corbin*, 495 U. S. 508 (1990) (right under Double Jeopardy Clause not to be subjected twice to prosecution for same criminal conduct); *Mills* v. *Maryland*, *supra* (Eighth Amendment right to jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); *United States* v. *Paradise*, 480 U. S. 149 (1987) (right to promotions as remedy for racial discrimination in government hiring); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (Eighth Amendment right not to be executed if insane); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986) (reaffirming

right to abortion recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973)); *Aguilar* v. *Felton*, 473 U. S. 402 (1985) (Establishment Clause bar on governmental financial assistance to parochial schools).[2]

In my view, this impoverished conception of *stare decisis* cannot possibly be reconciled with the values that inform the proper judicial function. Contrary to what the majority suggests, *stare decisis* is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments." *Moragne* v. *States Marine Lines*, 398 U. S., at 403. Indeed, this function of *stare decisis* is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving com-

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[2] Based on the majority's new criteria for overruling, these decisions, too, must be included on the "endangered precedents" list: *Rutan* v. *Republican Party of Illinois*, 497 U. S. 62 (1990) (First Amendment right not to be denied public employment on the basis of party affiliation); *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990) (First Amendment right to advertise legal specialization); *Zinermon* v. *Burch*, 494 U. S. 113 (1990) (due process right to procedural safeguards aimed at assuring voluntariness of decision to commit oneself to mental hospital); *James* v. *Illinois*, 493 U. S. 307 (1990) (Fourth Amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witness); *Rankin* v. *McPherson*, 483 U. S. 378 (1987) (First Amendment right of public employee to express views on matter of public importance); *Rock* v. *Arkansas*, 483 U. S. 44 (1987) (Fifth Amendment and Sixth Amendment right of criminal defendant to provide hypnotically refreshed testimony on his own behalf); *Gray* v. *Mississippi*, 481 U. S. 648 (1987) (rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by "death qualified" jury); *Maine* v. *Moulton*, 474 U. S. 159 (1985) (Sixth Amendment right to counsel violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (rejecting theory that Tenth Amendment provides immunity to States from federal regulation); *Pulliam* v. *Allen*, 466 U. S. 522 (1984) (right to obtain injunctive relief from constitutional violations committed by judicial officials).

mercial entitlements. Because enforcement of the Bill of Rights and the Fourteenth Amendment frequently requires this Court to rein in the forces of democratic politics, this Court can legitimately lay claim to compliance with its directives only if the public understands the Court to be implementing "principles . . . founded in the law rather than in the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986).[3] Thus, as JUSTICE STEVENS has explained, the "stron[g] presumption of validity" to which "recently decided cases" are entitled "is an essential thread in the mantle of protection that the law affords the individual. . . . It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law." *Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S., at 153–154 (concurring opinion).

Carried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. See

[3] It does not answer this concern to suggest that Justices owe fidelity to the text of the Constitution rather than to the case law of this Court interpreting the Constitution. See, *e. g.*, *South Carolina* v. *Gathers*, 490 U. S., at 825 (SCALIA, J., dissenting). The text of the Constitution is rarely so plain as to be self-executing; invariably, this Court must develop mediating principles and doctrines in order to bring the text of constitutional provisions to bear on particular facts. Thus, to rebut the charge of personal lawmaking, Justices who would discard the mediating principles embodied in precedent must do more than state that they are following the "text" of the Constitution; they must explain why they are entitled to substitute *their* mediating principles for those that are already settled in the law. And such an explanation will be sufficient to legitimize the departure from precedent only if it measures up to the extraordinary standard necessary to justify overruling one of this Court's precedents. See generally Note, 103 Harv. L. Rev. 1344, 1351–1354 (1990).

Mitchell v. *W. T. Grant Co.*, 416 U. S., at 634 (Stewart, J., dissenting). By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5–4 vote "over spirited dissen[t]," *ante*, at 829, the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question.

Indeed, the majority's disposition of this case nicely illustrates the rewards of such a strategy of defiance. The Tennessee Supreme Court did nothing in this case to disguise its contempt for this Court's decisions in *Booth* and *Gathers*. Summing up its reaction to those cases, it concluded:

> "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or harm imposed, upon the victims." 791 S. W. 2d 10, 19 (1990).

Offering no explanation for how this case could possibly be distinguished from *Booth* and *Gathers*—for obviously, there is none to offer—the court perfunctorily declared that the victim-impact evidence and the prosecutor's argument based on this evidence "did not violate either [of those decisions]." *Ibid.* It cannot be clearer that the court simply declined to be bound by this Court's precedents.[4]

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[4] Equally unsatisfactory is the Tennessee Supreme Court's purported finding that any error associated with the victim-impact evidence in this case was harmless. See 791 S. W. 2d, at 19. This finding was based on the court's conclusion that "the death penalty was the only rational punishment available" in light of the "inhuman brutality" evident in the circumstances of the murder. *Ibid.* It is well established that a State cannot make the death penalty mandatory for any class of aggravated murder; no matter how "brutal" the circumstances of the offense, the State must permit the sentencer discretion to impose a sentence of less than death. See

Far from condemning this blatant disregard for the rule of law, the majority applauds it. In the Tennessee Supreme Court's denigration of *Booth* and *Gathers* as "'an affront to the civilized members of the human race,'" the majority finds only confirmation of "the unfairness of the rule pronounced by" the majorities in those cases. *Ante*, at 826. It is hard to imagine a more complete abdication of this Court's historic commitment to defending the supremacy of its own pronouncements on issues of constitutional liberty. See *Cooper* v. *Aaron*, 358 U. S. 1 (1958); see also *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). In light of the cost that such abdication exacts on the authoritativeness of *all* of this Court's pronouncements, it is also hard to imagine a more short-sighted strategy for effecting change in our constitutional order.

Roberts v. *Louisiana*, 428 U. S. 325 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). It follows that an appellate court cannot deem error to be automatically *harmless* based solely on the aggravated character of a murder without assessing the impact of the error on the sentencer's discretion. Cf. *Clemons* v. *Mississippi*, 494 U. S. 738, 751–752 (1990).

To sentence petitioner to death, the jury was required to find that the mitigating circumstances shown by petitioner did not outweigh the aggravating circumstances. See App. 21–22. In what it tried to pass off as harmless error analysis, the Tennessee Supreme Court failed to address how the victim-impact evidence introduced during the sentencing proceedings in this case likely affected the jury's determination that the balance of aggravating and mitigating circumstances dictated a death sentence. Outside of a videotape of the crime scene, the State introduced *no* additional substantive evidence in the penalty phase *other than* the testimony of Mary Zvolanek, mother and grandmother of the murder victims. See 791 S. W. 2d, at 17. Under these circumstances, it is simply impossible to conclude that this victim-impact testimony, combined with the prosecutor's extrapolation from it in his closing argument, was harmless beyond a reasonable doubt.

III

Today's decision charts an unmistakable course. If the majority's radical reconstruction of the rules for overturning this Court's decisions is to be taken at face value—and the majority offers us no reason why it should not—then the overruling of *Booth* and *Gathers* is but a preview of an even broader and more far-reaching assault upon this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's "spirited dissents" will squander the authority and the legitimacy of this Court as a protector of the powerless.

I dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The novel rule that the Court announces today represents a dramatic departure from the principles that have governed our capital sentencing jurisprudence for decades. JUSTICE MARSHALL is properly concerned about the majority's trivialization of the doctrine of *stare decisis*. But even if *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), had not been decided, today's decision would represent a sharp break with past decisions. Our cases provide no support whatsoever for the majority's conclusion that the prosecutor may introduce evidence that sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.

Until today our capital punishment jurisprudence has required that any decision to impose the death penalty be based solely on evidence that tends to inform the jury about the character of the offense and the character of the defendant. Evidence that serves no purpose other than to appeal to the

sympathies or emotions of the jurors has never been considered admissible. Thus, if a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible. Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty.

I

In *Williams* v. *New York*, 337 U. S. 241 (1949), this Court considered the scope of the inquiry that should precede the imposition of a death sentence. Relying on practices that had developed "both before and since the American colonies became a nation," *id.*, at 246, Justice Black described the wide latitude that had been accorded judges in considering the source and type of evidence that is relevant to the sentencing determination. Notably, that opinion refers not only to the relevance of evidence establishing the defendant's guilt, but also to the relevance of "the fullest information possible concerning the defendant's life and characteristics." *Id.*, at 247. "Victim impact" evidence, however, was unheard of when *Williams* was decided. The relevant evidence of harm to society consisted of proof that the defendant was guilty of the offense charged in the indictment.

Almost 30 years after our decision in *Williams*, the Court reviewed the scope of evidence relevant in capital sentencing. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978). In his plurality opinion, Chief Justice Burger concluded that in a capital case, the sentencer must not be prevented "from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis deleted). As in *Williams*, the character of the offense and the character of the offender constituted

the entire category of relevant evidence. "Victim impact" evidence was still unheard of when *Lockett* was decided.

As the Court acknowledges today, the use of victim impact evidence "is of recent origin," *ante*, at 821. Insofar as the Court's jurisprudence is concerned, this type of evidence made its first appearance in 1987 in *Booth* v. *Maryland*, 482 U. S. 496. In his opinion for the Court, Justice Powell noted that our prior cases had stated that the question whether an individual defendant should be executed is to be determined on the basis of "'the character of the individual and the circumstances of the crime,'" *id.*, at 502 (quoting *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983)). See also *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). Relying on those cases and on *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), the Court concluded that unless evidence has some bearing on the defendant's personal responsibility and moral guilt, its admission would create a risk that a death sentence might be based on considerations that are constitutionally impermissible or totally irrelevant to the sentencing process. 482 U. S., at 502. Evidence that served no purpose except to describe the personal characteristics of the victim and the emotional impact of the crime on the victim's family was therefore constitutionally irrelevant.

Our decision in *Booth* was entirely consistent with the practices that had been followed "both before and since the American colonies became a nation," *Williams*, 337 U. S., at 246. Our holding was mandated by our capital punishment jurisprudence, which requires any decision to impose the death penalty to be based on reason rather than caprice or emotion. See *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (opinion of STEVENS, J.). The dissenting opinions in *Booth* and in *Gathers* can be searched in vain for any judicial precedent sanctioning the use of evidence unrelated to the character of the offense or the character of the offender in the sentencing process. Today, however, relying on nothing more than those dissenting opinions, the Court abandons

rules of relevance that are older than the Nation itself and ventures into uncharted seas of irrelevance.

II

Today's majority has obviously been moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion. Because our decision in *Lockett*, 438 U. S., at 604 (opinion of Burger, C. J.), recognizes the defendant's right to introduce all mitigating evidence that may inform the jury about his character, the Court suggests that fairness requires that the State be allowed to respond with similar evidence about the *victim*. See *ante*, at 825–826.[1] This argument is a classic non sequitur: The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance.

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[1] JUSTICE SCALIA accurately described the argument in his dissent in *Booth* v. *Maryland*, 482 U. S. 496 (1987):

"Recent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights'—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty." *Id.*, at 520.

In his concurring opinion today, JUSTICE SCALIA again relies on the popular opinion that has "found voice in a nationwide 'victims' rights' movement." *Ante*, at 834. His view that the exclusion of evidence about "a crime's unanticipated consequences" "significantly harms our criminal justice system," *ibid.*, rests on the untenable premise that the strength of that system is to be measured by the number of death sentences that may be returned on the basis of such evidence. Because the word "arbitrary" is not to be found in the constitutional text, he apparently can find no reason to object to the arbitrary imposition of capital punishment.

Even if introduction of evidence about the victim could be equated with introduction of evidence about the defendant, the argument would remain flawed in both its premise and its conclusion. The conclusion that exclusion of victim impact evidence results in a significantly imbalanced sentencing procedure is simply inaccurate. Just as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence and may designate any relevant conduct to be an aggravating factor provided that the factor is sufficiently well defined and consistently applied to cabin the sentencer's discretion.

The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is also incorrect. The Constitution grants certain rights to the criminal defendant and imposes special limitations on the State designed to protect the individual from overreaching by the disproportionately powerful State. Thus, the State must prove a defendant's guilt beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358 (1970). Rules of evidence are also weighted in the defendant's favor. For example, the prosecution generally cannot introduce evidence of the defendant's character to prove his propensity to commit a crime, but the defendant can introduce such reputation evidence to show his law-abiding nature. See, *e. g.*, Fed. Rule Evid. 404(a). Even if balance were required or desirable, today's decision, by permitting both the defendant and the State to introduce irrelevant evidence for the sentencer's consideration without any guidance, surely does nothing to enhance parity in the sentencing process.

III

Victim impact evidence, as used in this case, has two flaws, both related to the Eighth Amendment's command that the punishment of death may not be meted out arbitrarily or capriciously. First, aspects of the character of the victim unforeseeable to the defendant at the time of his crime are irrel-

evant to the defendant's "personal responsibility and moral guilt" and therefore cannot justify a death sentence. See *Enmund* v. *Florida*, 458 U. S., at 801; see also *id.*, at 825 (O'CONNOR, J., dissenting) ("[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); *Tison* v. *Arizona*, 481 U. S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender"); *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring).

Second, the quantity and quality of victim impact evidence sufficient to turn a verdict of life in prison into a verdict of death is not defined until after the crime has been committed and therefore cannot possibly be applied consistently in different cases. The sentencer's unguided consideration of victim impact evidence thus conflicts with the principle central to our capital punishment jurisprudence that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Open-ended reliance by a capital sentencer on victim impact evidence simply does not provide a "principled way to distinguish [cases], in which the death penalty [i]s imposed, from the many cases in which it [i]s not." *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (opinion of Stewart, J.).

The majority attempts to justify the admission of victim impact evidence by arguing that "consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion." *Ante*, at 820. This statement is misleading and inaccurate. It is misleading because it is not limited to harm that is foreseeable. It is inaccurate because it fails to differentiate between legislative determinations and judicial sentencing. It is true that an evaluation of

the harm caused by different kinds of wrongful conduct is a critical aspect in legislative definitions of offenses and determinations concerning sentencing guidelines. There is a rational correlation between moral culpability and the foreseeable harm caused by criminal conduct. Moreover, in the capital sentencing area, legislative identification of the special aggravating factors that may justify the imposition of the death penalty is entirely appropriate.[2] But the majority cites no authority for the suggestion that unforeseeable and indirect harms to a victim's family are properly considered as aggravating evidence on a case-by-case basis.

The dissents in *Booth* and *Gathers* and the majority today offer only the recent decision in *Tison* v. *Arizona*, 481 U. S. 137 (1987), and two legislative examples to support their contention that harm to the victim has traditionally influenced sentencing discretion. *Tison* held that the death penalty may be imposed on a felon who acts with reckless disregard for human life if a death occurs in the course of the felony, even though capital punishment cannot be imposed if no one dies as a result of the crime. The first legislative example is that attempted murder and murder are classified as two different offenses subject to different punishments. *Ante*, at 819. The second legislative example is that a person who drives while intoxicated is guilty of vehicular homicide if his actions result in a death but is not guilty of this offense if he has the good fortune to make it home without killing anyone. See *Booth*, 482 U. S., at 516 (WHITE, J., dissenting).

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[2] Thus, it is entirely consistent with the Eighth Amendment principles underlying *Booth* and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), to authorize the death sentence for the assassination of the President or Vice President, see 18 U. S. C. §§ 1751, 1111, a Congressman, Cabinet official, Supreme Court Justice, or the head of an executive department, § 351, or the murder of a policeman on active duty, see Md. Ann. Code, Art. 27, § 413(d)(1) (1987). Such statutory provisions give the potential offender notice of the special consequences of his crime and ensure that the legislatively determined punishment will be applied consistently to all defendants.

These three scenarios, however, are fully consistent with the Eighth Amendment jurisprudence reflected in *Booth* and *Gathers* and do not demonstrate that harm to the victim may be considered by a capital sentencer in the ad hoc and post hoc manner authorized by today's majority. The majority's examples demonstrate only that harm to the victim may justify enhanced punishment if the harm is both foreseeable to the defendant and clearly identified in advance of the crime by the legislature as a class of harm that should in every case result in more severe punishment.

In each scenario, the defendants could reasonably foresee that their acts might result in loss of human life. In addition, in each, the decision that the defendants should be treated differently was made prior to the crime by the legislature, the decision of which is subject to scrutiny for basic rationality. Finally, in each scenario, every defendant who causes the well-defined harm of destroying a human life will be subject to the determination that his conduct should be punished more severely. The majority's scenarios therefore provide no support for its holding, which permits a jury to sentence a defendant to death because of harm to the victim and his family that the defendant could not foresee, which was not even identified until after the crime had been committed, and which may be deemed by the jury, without any rational explanation, to justify a death sentence in one case but not in another. Unlike the rule elucidated by the scenarios on which the majority relies, the majority's holding offends the Eighth Amendment because it permits the sentencer to rely on irrelevant evidence in an arbitrary and capricious manner.

The majority's argument that "the sentencing authority has always been free to consider a wide range of *relevant* material," *ante*, at 820–821 (emphasis added), thus cannot justify consideration of victim impact evidence that is *irrelevant* because it details harms that the defendant could not have foreseen. Nor does the majority's citation of *Gregg* v. *Geor-*

gia concerning the "wide scope of evidence and argument allowed at presentence hearings," 428 U. S., at 203 (joint opinion of Stewart, Powell, and STEVENS, JJ.), support today's holding. See *ante*, at 821. The *Gregg* joint opinion endorsed the sentencer's consideration of a wide range of evidence "[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant." 428 U. S., at 203–204. Irrelevant victim impact evidence that distracts the sentencer from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors necessarily prejudices the defendant.

The majority's apparent inability to understand this fact is highlighted by its misunderstanding of Justice Powell's argument in *Booth* that admission of victim impact evidence is undesirable because it risks shifting the focus of the sentencing hearing away from the defendant and the circumstances of the crime and creating a "'mini-trial' on the victim's character." 482 U. S., at 507. *Booth* found this risk insupportable not, as today's majority suggests, because it creates a "tactical" "dilemma" for the defendant, see *ante*, at 823, but because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice. See 482 U. S., at 506–507.

IV

The majority thus does far more than validate a State's judgment that "the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' *Mills* v. *Maryland*, 486 U. S. 367, 397 (1988) (REHNQUIST, C. J., dissenting)." *Ante*, at 830–831 (O'CONNOR, J., concurring). Instead, it allows a jury to hold a defendant responsible for a whole array of harms that he could not foresee and for which he is therefore not blameworthy. JUSTICE SOUTER argues that these harms are sufficiently foreseeable to hold the defendant accountable because "[e]very defendant knows, if endowed with the mental competence for criminal responsibility, that

the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death." *Ante*, at 838 (SOUTER, J., concurring). But every juror and trial judge knows this much as well. Evidence about who those survivors are and what harms and deprivations they have suffered is therefore not necessary to apprise the sentencer of any information that was actually foreseeable to the defendant. Its only function can be to "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." See *Booth*, 482 U. S., at 505.

Arguing in the alternative, JUSTICE SOUTER correctly points out that victim impact evidence will sometimes come to the attention of the jury during the guilt phase of the trial. *Ante*, at 840. He reasons that the ideal of basing sentencing determinations entirely on the moral culpability of the defendant is therefore unattainable unless a different jury is empaneled for the sentencing hearing. *Ante*, at 841. Thus, to justify overruling *Booth*, he assumes that the decision must otherwise be extended far beyond its actual holding.

JUSTICE SOUTER's assumption is entirely unwarranted. For as long as the contours of relevance at sentencing hearings have been limited to evidence concerning the character of the offense and the character of the offender, the law has also recognized that evidence that is admissible for a proper purpose may not be excluded because it is inadmissible for other purposes and may indirectly prejudice the jury. See 1 J. Wigmore, Evidence § 13 (P. Tillers rev. 1983). In the case before us today, much of what might be characterized as victim impact evidence was properly admitted during the guilt phase of the trial and, given the horrible character of this crime, may have been sufficient to justify the Tennessee Supreme Court's conclusion that the error was harmless because the jury would necessarily have imposed the death sentence even absent the error. The fact that a good deal of

such evidence is routinely and properly brought to the attention of the jury merely indicates that the rule of *Booth* may not affect the outcome of many cases.

In reaching our decision today, however, we should not be concerned with the cases in which victim impact evidence will not make a difference. We should be concerned instead with the cases in which it will make a difference. In those cases, defendants will be sentenced arbitrarily to death on the basis of evidence that would not otherwise be admissible because it is irrelevant to the defendants' moral culpability. The Constitution's proscription against the arbitrary imposition of the death penalty must necessarily proscribe the admission of evidence that serves no purpose other than to result in such arbitrary sentences.

V

The notion that the inability to produce an ideal system of justice in which every punishment is precisely married to the defendant's blameworthiness somehow justifies a rule that completely divorces some capital sentencing determinations from moral culpability is incomprehensible to me. Also incomprehensible is the argument that such a rule is required for the jury to take into account that each murder victim is a "unique" human being. See *ante*, at 823; *ante*, at 830–831 (O'CONNOR, J., concurring); *ante*, at 838 (SOUTER, J., concurring). The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black. See *McCleskey* v. *Kemp*, 481 U. S. 279, 366 (1987) (STEVENS, J., dissenting).

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described[3]—and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case,[4] and in its decision to reach the constitutional question without pausing to consider affirming on the basis of the Tennessee Supreme Court's rationale,[5] but even in its resolution of the constitutional issue involved. Today is a sad day for a great institution.

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[3] *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401 (1904) (Holmes, J., dissenting).

[4] See *Payne* v. *Tennessee*, 498 U. S. 1076 (1991) (STEVENS, J., dissenting).

[5] *Rust* v. *Sullivan*, 500 U. S. 173, 223 (1991) (O'CONNOR, J., dissenting).

FREYTAG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–762. Argued April 23, 1991—Decided June 27, 1991

The Chief Judge of the United States Tax Court, an Article I court composed of 19 judges appointed by the President, is authorized to appoint special trial judges, 26 U. S. C. § 7443A(a), and to assign to them certain specified proceedings, §§ 7443A(b)(1), (2), and (3), and "any other proceeding which the chief judge may designate," § 7443A(b)(4). As to subsection (b)(4) proceedings, the special trial judge may hear the case and prepare proposed findings and an opinion, but the actual decision is rendered by a Tax Court judge, § 7443A(c). When petitioners sought review in the Tax Court of determinations of approximately $1.5 billion in federal income tax deficiencies, their cases were assigned to a Tax Court judge but were later reassigned, with petitioners' consent, to a Special Trial Judge. His unfavorable opinion was adopted by the Chief Judge as the opinion of the Tax Court. The Court of Appeals affirmed, rejecting petitioners' arguments that the assignment of complex cases to a special trial judge was not authorized by § 7443A and that such assignment violated the Appointments Clause of the Constitution, which, *inter alia*, limits congressional discretion to vest the appointment of "inferior Officers" to the President, the heads of departments, and the courts of law.

Held:

1. Subsection (b)(4) authorizes the Chief Judge to assign *any* Tax Court proceeding, regardless of complexity or amount in controversy, to a special trial judge for hearing and preparation of proposed findings and a written opinion. Its plain language contains no limiting term restricting its reach to cases that are minor, simple, or narrow; and neither the statute's structure nor legislative history contradicts the broad sweep of this language. Pp. 873–877.

2. Section 7443A does not transgress the structure of separation of powers embodied in the Appointments Clause. Pp. 877–892.

(a) This is one of those rare cases in which the Court should exercise its discretion to hear petitioners' challenge. That challenge goes to the validity of the Tax Court proceeding that is the basis for this litigation and, thus, is a nonjurisdictional structural constitutional objection that

may be considered, even though petitioners consented to the assignment. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 535–536. Pp. 878–880.

(b) A special trial judge is an "inferior Office[r]" whose appointment must conform to the Appointments Clause. Such a judge acts as an inferior officer who exercises independent authority in cases governed by subsections (b)(1), (2), and (3). The fact that in subsection (b)(4) cases he performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status. Pp. 880–882.

(c) The Clause reflects the Framers' conclusion that widely distributed appointment power subverts democratic government. Thus, such power can be vested in the Tax Court's Chief Judge only if that court falls within one of the three repositories the Clause specifies. Clearly Congress did not intend to grant the President the power to appoint special trial judges. And the term "Departmen[t]" refers only to executive divisions like Cabinet-level departments. *United States* v. *Germaine*, 99 U. S. 508, 510–511. Treating the Tax Court as a "Department" would defy the purpose of the Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform that court from an executive agency into an Article I court. Pp. 882–888.

(d) An Article I court, which exercises judicial power, can be a "Cour[t] of Law" within the meaning of the Appointments Clause. The reference to "Courts of Law" cannot be limited to Article III courts merely because they are the only courts the Constitution mentions. Congress has wide discretion to assign the task of adjudication to legislative tribunals, see, *e. g.*, *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546; and an Article I court cannot exercise judicial power and not be one of the "Courts of Law." *Buckley* v. *Valeo*, 424 U. S. 1, distinguished. To hold otherwise would also undermine Congress' understanding that Article I courts can be given the power to appoint. See, *e. g.*, *In re Hennen*, 13 Pet. 230. Pp. 888–890.

(e) The Tax Court is a "Cour[t] of Law" within the Clause's meaning. It exercises judicial power to the exclusion of any other function; its function and role closely resemble those of the federal district courts; and it is independent of the Executive and Legislative Branches, in that its decisions are appealable in the same manner as those of the district courts. Pp. 890–892.

904 F. 2d 1011, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring

in the judgment, in which O'CONNOR, KENNEDY, and SOUTER, JJ., joined, *post*, p. 892.

Kathleen M. Sullivan argued the cause for petitioners. With her on the briefs were *Brian Stuart Koukoutchos* and *Richard J. Sideman.*

Deputy Solicitor General Roberts argued the cause for respondent. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Stephen J. Marzen, Gary R. Allen,* and *Steven W. Parks.**

JUSTICE BLACKMUN delivered the opinion of the Court.

The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961). In this litigation, we must decide whether the authority that Congress has granted the Chief Judge of the United States Tax Court to appoint special trial judges transgresses our structure of separated powers. We answer that inquiry in the negative.

I

By the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U. S. C. § 7441, Congress "established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." It also empowered the Tax Court to appoint commissioners to assist its judges. § 958, 83 Stat. 734. By the Tax Reform Act of 1984, § 464(a), 98 Stat. 824, the title "commissioner" was changed to "special trial judge." By § 463(a) of that Act, 98 Stat. 824, and by § 1556(a) of the Tax Reform Act of 1986, 100 Stat. 2754, Congress authorized the Chief Judge of the Tax Court to appoint and assign these special trial judges to hear certain specifi-

**Erwin N. Griswold, pro se,* and *Patricia A. Dunn* filed a brief of *amicus curiae.*

cally described proceedings and "any other proceeding which the chief judge may designate." 26 U. S. C. §§ 7443A(a) and (b). The Tax Court presently consists of 19 judges appointed to 15-year terms by the President, by and with the advice and consent of the Senate. §§ 7443(a), (b), and (e).

II

This complex litigation began with determinations of federal income tax deficiencies against the several petitioners, who had deducted on their returns approximately $1.5 billion in losses allegedly realized in a tax shelter scheme.[1] When petitioners sought review in the Tax Court in March 1982, their cases were assigned to Tax Court Judge Richard C. Wilbur. Trial began in 1984. Judge Wilbur became ill in November 1985, and the Chief Judge of the Tax Court assigned Special Trial Judge Carleton D. Powell to preside over the trial as evidentiary referee, with the proceedings videotaped. App. 2. When Judge Wilbur's illness forced his retirement and assumption of senior status effective April 1, 1986, the cases were reassigned, with petitioners' specified consent, Brief for Petitioners 8; Tr. of Oral Arg. 10, to Judge Powell for preparation of written findings and an opinion. App. 8, 12–14. The judge concluded that petitioners' tax shelter scheme consisted of sham transactions and that peti-

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[1] At oral argument, counsel for petitioners described the litigation in this way:

"This is a tax case with implications for up to 3,000 taxpayers and a billion and a half in alleged tax deficiencies, and it involved one of the longest trials below in the tax court's history—14 weeks of evidence, complex financial testimony, 9,000 pages of transcripts, 3,000-plus exhibits." Tr. of Oral Arg. 3.

Counsel also stated petitioners' primary position:

"In other words, just to put our point succinctly, Congress did not and could not have intended special trial judges in large, complex, multiparty, multimillion dollar tax shelter cases—alleged tax shelter cases such as this one—Congress did not and could not have intended such cases to be in effect decided by the autonomous actions of a special trial judge." *Id.*, at 17.

tioners owed additional taxes. The Chief Judge adopted Judge Powell's opinion as that of the Tax Court. 89 T. C. 849 (1987).[2]

Petitioners took an appeal to the Court of Appeals for the Fifth Circuit. It affirmed. 904 F. 2d 1011 (1990). Petitioners did not argue to the Court of Appeals, nor do they argue here, that the Tax Court is not a legitimate body. Rather, they contended that the assignment of cases as complex as theirs to a special trial judge was not authorized by § 7443A, and that this violated the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. The Court of Appeals ruled that because the question of the Special Trial Judge's authority was "in essence, an attack upon the subject matter jurisdiction of the special trial judge, it may be raised for the first time on appeal." 904 F. 2d, at 1015 (footnote omitted). The court then went on to reject petitioners' claims on the merits. It concluded that the Code authorized the Chief Judge of the Tax Court to assign a special trial judge to hear petitioners' cases and that petitioners had waived any constitutional challenge to this appointment by consenting to a trial before Judge Powell. *Id.*, at 1015, n. 9.

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[2] Petitioners place some emphasis on the facts that Special Trial Judge Powell filed his proposed findings and opinion with the Tax Court on October 21, 1987; that on that day the Chief Judge issued an order reassigning the litigation to himself for disposition, App. 15; and that on that same day the Chief Judge adopted the opinion of Judge Powell. Brief for Petitioners 8–9. Indeed, the opinion, including its appendix, covers 44 pages in the Tax Court Reports. At oral argument, however, counsel observed that Judge Powell "sometime in the preceding 4 months had filed a report with the Chief Judge of the tax court." Tr. of Oral Arg. 11. In any event, this chronology does not appear to us to be at all significant. The Chief Judge had the duty to review the work of the Special Trial Judge, and there is nothing in the record disclosing how much time he devoted to the task. As Chief Judge he was aware of the presence of the several cases in the court and the magnitude of the litigation. The burden of proof as to any negative inference to be drawn from the time factor rests on petitioners. We are not inclined to assume "rubber stamp" activity on the part of the Chief Judge.

We granted certiorari, 498 U. S. 1066 (1991), to resolve the important questions the litigation raises about the Constitution's structural separation of powers.

III

Section 7443A(b) of the Internal Revenue Code specifically authorizes the Chief Judge of the Tax Court to assign four categories of cases to special trial judges: "(1) any declaratory judgment proceeding," "(2) any proceeding under section 7463," "(3) any proceeding" in which the deficiency or claimed overpayment does not exceed $10,000, and "(4) any other proceeding which the chief judge may designate." In the first three categories, the Chief Judge may assign the special trial judge not only to hear and report on a case but also to decide it. § 7443A(c). In the fourth category, the Chief Judge may authorize the special trial judge only to hear the case and prepare proposed findings and an opinion. The actual decision then is rendered by a regular judge of the Tax Court.

Petitioners argue that adjudication by the Special Trial Judge in this litigation exceeded the bounds of the statutory authority that Congress has conferred upon the Tax Court. Despite what they concede to be the "sweeping language" of subsection (b)(4), Brief for Petitioners 6, petitioners claim that Congress intended special trial judges to preside over only the comparatively narrow and minor matters covered by subsections (b)(1), (2), and (3).

The plain language of § 7443A(b)(4) surely authorizes the Chief Judge's assignment of petitioners' cases to a special trial judge. When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances. *Demarest* v. *Manspeaker*, 498 U. S. 184, 190 (1991). Subsection (b)(4) could not be more clear. It states that the Chief Judge may assign "any other proceeding" to a special trial judge for duties short of "mak[ing] the decision." The subsection's text contains no

limiting term that restricts its reach to cases that are minor, simple, or narrow, as petitioners urge. We have stated that courts "are not at liberty to create an exception where Congress has declined to do so." *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989).

Nothing in the legislative history contradicts the broad sweep of subsection (b)(4)'s language. In proposing to authorize the Chief Judge to assign "any other proceeding" to the special trial judges, the Committee on Ways and Means stated that it intended "to clarify" that any other proceeding could be assigned to special trial judges "so long as a Tax Court judge must enter the decision." H. R. Rep. No. 98–432, pt. 2, p. 1568 (1984). The Report goes on to explain:

> "A technical change is made to allow the Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and to write proposed opinions, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not be authorized to enter decisions in this latter category of cases." *Ibid.*

The Conference Report "follows the House Bill," H. R. Conf. Rep. No. 98–861, p. 1127 (1984), and, like the House Report, indicates that Congress knowingly removed the jurisdictional requirement of a maximum amount in dispute in order to expand the authority of special trial judges to hear, but not to decide, cases covered by subsection (b)(4).

Petitioners appear not to appreciate the distinction between the special trial judges' authority to hear cases and prepare proposed findings and opinions under subsection (b)(4) and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court.[3] Because they do not distinguish between hearing a

[3] Petitioners also argue that the deferential standard with which Tax Court Rule 183 requires a Tax Court judge to review the factual findings of a special trial judge allows the latter not only to hear a case but effectively to resolve it. This point is not relevant to our grant of certiorari, which

case and deciding it, petitioners advance two arguments that, it seems to us, miss the mark.

Petitioners first argue that the legislative history notes that the amendment to what is now § 7443A was merely a "technical" change and cannot be read to transfer dispositive power to special trial judges. Petitioners are correct that the 1984 amendment neither transferred decisional power nor altered the substantive duties of the special trial judges. Congress has limited the authority of special trial judges to enter decisions to the narrow category of cases set forth in subsections (b)(1), (2), and (3). The scope of the special trial judges' authority to hear and decide cases, however, has little, if any, relevance to the category of cases that the special trial judges may hear but not decide.

Since the enactment of the Revenue Act of 1943, § 503, 58 Stat. 72, the Tax Court has possessed authority to appoint commissioners to assist it in particular cases. Special trial judges and their predecessors, the commissioners, have been authorized for almost a half century to hear any case before the Tax Court in the discretion of its Chief Judge. In practice, before 1984, special trial judges often heard and reported on large and complex cases. Accordingly, when Congress adopted subsection (b)(4), it codified the Chief Judge's discretion to assign cases like petitioners' to a special trial judge for hearing and preparation of a report. The 1984 amendment was "technical" in light of the historical development of the special trial judges' role; the technical nature of the amendment, however, does not alter the wide-ranging effect of the statutory text's grant of authority to the Chief Judge to assign "any other proceeding" within the Tax Court's jurisdiction to a special trial judge.

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concerned the question whether the assignment of petitioners' cases to a special trial judge was authorized by 26 U. S. C. § 7443A(b)(4). Accordingly, we say no more about this new argument than to note that under § 7443A(c) a special trial judge has no authority to decide a case assigned under subsection (b)(4).

Petitioners also argue that the phrase "any other proceeding" is a general grant of authority to fill unintended gaps left by subsections (b)(1), (2), and (3). Reading subsection (b)(4) as a catchall provision, petitioners argue that its meaning must be limited to cases involving a small amount of money because any other interpretation would render the limitations imposed by subsections (b)(1), (2), and (3) a nullity. In support of this argument, petitioners rely on this Court's decision in *Gomez* v. *United States*, 490 U. S. 858 (1989).

We held in *Gomez* that the Federal Magistrates Act's general grant of authority allowing magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U. S. C. § 636(b)(3), did not permit a magistrate to supervise juror *voir dire* in a felony trial over a defendant's objection. In so holding, we explained:

> "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties." 490 U. S., at 864.

In the Magistrates Act, the list of specifically enumerated duties followed the general grant of authority and provided the outlines for the scope of the general grant. Unlike the Magistrates Act, § 7443A explicitly distinguishes between the categories of cases enumerated in subsections (b)(1), (2), and (3), which are declaratory judgment proceedings and cases involving $10,000 or less, and the category of "any other proceeding" found in subsection (b)(4).

The lesser authority exercised by special trial judges in proceedings under subsection (b)(4) also prevents that subsection from serving as a grant of general authority to fill any gaps left in the three preceding subsections. Special trial judges may hear *and* decide declaratory judgment proceedings and the limited-amount cases. A special trial judge,

however, cannot render the final decision of the Tax Court in a case assigned under subsection (b)(4). If the cases that special trial judges may hear, but not decide, under subsection (b)(4) are limited to the same kind of cases they could hear and decide under the three preceding subsections, then subsection (b)(4) would be superfluous. Our cases consistently have expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 562 (1990). See also *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187, 201 (1991). The scope of subsection (b)(4) must be greater than that of subsections (b)(1), (2), and (3).

We conclude that subsection (b)(4) permits the Chief Judge to assign *any* Tax Court proceeding, regardless of complexity or amount, to a special trial judge for hearing and the preparation of proposed findings and written opinion. The statute's language, structure, and history permit no other conclusion.

IV

This construction of § 7443A raises a constitutional issue to which we now must turn. Petitioners submit that if subsection (b)(4) permits a special trial judge to preside over the trial of any Tax Court case, then the statute violates the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. According to petitioners, a special trial judge is an "Office[r]" of the United States who must be appointed in compliance with the Clause. The Clause reads:

> "He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in

> the President alone, in the Courts of Law, or in the Heads of Departments."

Thus, the Constitution limits congressional discretion to vest power to appoint "inferior Officers" to three sources: "the President alone," "the Heads of Departments," and "the Courts of Law." Petitioners argue that a special trial judge is an "inferior Office[r]," and also contend that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power.

A

We first address the Commissioner's argument that petitioners have waived their right to challenge the constitutional propriety of § 7443A. The Commissioner contends that petitioners waived this right not only by failing to raise a timely objection to the assignment of their cases to a special trial judge, but also by consenting to the assignment.

The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. See *Mistretta* v. *United States*, 488 U. S. 361, 382 (1989). The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.

The Commissioner correctly notes that petitioners gave their consent to trial before the Special Trial Judge. This Court in the past, however, has exercised its discretion to consider nonjurisdictional claims that had not been raised below. See *Grosso* v. *United States*, 390 U. S. 62, 71–72 (1968); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 535–536 (1962); *Hormel* v. *Helvering*, 312 U. S. 552, 556–560 (1941). *Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional struc-

tural constitutional objections that could be considered on appeal whether or not they were ruled upon below:

> "And in *Lamar* v. *United States*, 241 U. S. 103, 117–118, the claim that an intercircuit assignment . . . usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review." *Glidden*, 370 U. S., at 536 (Harlan, J., announcing the judgment of the Court).

Like the Court in *Glidden*, we are faced with a constitutional challenge that is neither frivolous nor disingenuous. The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation. It is true that, as a general matter, a litigant must raise all issues and objections at trial. But the disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome what Justice Harlan called "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Ibid.* We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.

In reaching this conclusion, we note that we are not persuaded by the Commissioner's request that this Court defer to the Executive Branch's decision that there has been no legislative encroachment on Presidential prerogatives under the Appointments Clause in connection with § 7443A. According to the Commissioner, the structural interests implicated in this litigation are those of the Executive Branch, which can be expected to look out for itself. It is claimed, accordingly, that there is no need for this Court to be concerned about protecting the separation-of-powers interests at stake here.

We are not persuaded by this approach. The Commissioner, we believe, is in error when he assumes that the interest at stake is the Executive's own appointment power. The structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection. "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." *INS* v. *Chadha*, 462 U. S. 919, 942, n. 13 (1983). The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.

B

We turn to another preliminary issue in petitioners' Appointments Clause challenge. Petitioners argue that a special trial judge is an "inferior Office[r]" of the United States. If we disagree, and conclude that a special trial judge is only an employee, petitioners' challenge fails, for such "lesser functionaries" need not be selected in compliance with the strict requirements of Article II. *Buckley* v. *Valeo*, 424 U. S. 1, 126, n. 162 (1976).

The Commissioner, in contrast to petitioners, argues that a special trial judge assigned under § 7443A(b)(4) acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work, does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, spe-

cial trial judges acting pursuant to § 7443A(b)(4) are employees rather than "Officers of the United States."

"[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley*, 424 U. S., at 126. The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in *First Western Govt. Securities, Inc.* v. *Commissioner*, 94 T. C. 549, 557–559 (1990), and the Court of Appeals for the Second Circuit in *Samuels, Kramer & Co.* v. *Commissioner*, 930 F. 2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 352–353 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Offic[r]" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap* v. *United States*, 252 U. S. 512, 516–517 (1920); *United States* v. *Germaine*, 99 U. S. 508, 511–512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony,

conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§ 7443A(b)(1), (2), and (3), and (c), the Chief Judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority. But the Commissioner urges that petitioners may not rely on the extensive power wielded by the special trial judges in declaratory judgment proceedings and limited-amount tax cases because petitioners lack standing to assert the rights of taxpayers whose cases are assigned to special trial judges under subsections (b)(1), (2), and (3).

This standing argument seems to us to be beside the point. Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.

C

Having concluded that the special trial judges are "inferior Officers," we consider the substantive aspect of petitioners' Appointments Clause challenge. The principle of separation of powers is embedded in the Appointments Clause. Its relevant language bears repeating: "[T]he Congress may by

Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Congress clearly vested the Chief Judge of the Tax Court with the power to appoint special trial judges. An important fact about the appointment in this case should not be overlooked. This case does not involve an "interbranch" appointment. Cf. *Morrison* v. *Olson*, 487 U. S. 654, 675–677 (1988). However one might classify the Chief Judge of the Tax Court, there surely is nothing incongruous about giving him the authority to appoint the clerk or an assistant judge for that court. See *id.*, at 676. We do not consider here an appointment by some officer of inferior officers in, for example, the Department of Commerce or Department of State. The appointment in this case is so obviously appropriate that petitioners' burden of persuading us that it violates the Appointments Clause is indeed heavy.

Although petitioners bear a heavy burden, their challenge is a serious one. Despite Congress' authority to create offices and to provide for the method of appointment to those offices, "Congress' power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" *Buckley*, 424 U. S., at 138–139 (discussing Congress' power under the Necessary and Proper Clause).

The "manipulation of official appointments" had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776–1787, p. 79 (1969) (Wood), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of eighteenth century despotism." *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the

sparse record indicates the Framers' determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison's complaint that the Appointments Clause did "not go far enough if it be necessary at all": Madison argued that "Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 Records of the Federal Convention of 1787, pp. 627–628 (M. Farrand rev. 1966). The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. See *Buckley*, 424 U. S., at 129–131. Even with respect to "inferior Officers," the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.

With this concern in mind, we repeat petitioners' central challenge: Can the Chief Judge of the Tax Court constitutionally be vested by Congress with the power to appoint? The Appointments Clause names the possible repositories for the appointment power. It is beyond question in this litigation that Congress did not intend to grant to the President the power to appoint special trial judges. We therefore are left with three other possibilities. First, as the Commissioner urges, the Tax Court could be treated as a department with the Chief Judge as its head. Second, as the *amicus* suggests, the Tax Court could be considered one of "the Courts of Law." Third, we could agree with petitioners that the Tax Court is neither a "Departmen[t]" nor a "Cour[t] of Law." Should we agree with petitioners, it would follow that the appointment power could not be vested in the Chief Judge of the Tax Court.

We first consider the Commissioner's argument. According to the Commissioner, the Tax Court is a department because for 45 years before Congress designated that court as a "court of record" under Article I, see § 7441, the body was an independent agency (the predecessor Board of Tax Appeals) within the Executive Branch. Furthermore, the Commissioner argues that § 7441 simply changed the status of the Tax Court within that branch. It did not remove the body to a different branch or change its substantive duties.

The Commissioner "readily" acknowledges that "the Tax Court's fit within the Executive Branch may not be a perfect one." Brief for Respondent 41. But he argues that the Tax Court must fall within one of the three branches and that the Executive Branch provides its best home. The reasoning of the Commissioner may be summarized as follows: (1) The Tax Court must fit into one of the three branches; (2) it does not fit into either the Legislative Branch or the Judicial Branch; (3) at one time it was an independent agency and therefore it must fit into the Executive Branch; and (4) every component of the Executive Branch is a department.

We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power. The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See Wood 79–80. So do we. For the Chief Judge of the Tax Court to qualify as a "Hea[d] of [a] Departmen[t]," the Commissioner must demonstrate not only that the Tax

Court is a part of the Executive Branch but also that it is a department.

We are not so persuaded. This Court for more than a century has held that the term "Departmen[t]" refers only to "'a part or division of the executive government, as the Department of State, or of the Treasury,'" expressly "creat[ed]" and "giv[en] . . . the name of a department" by Congress. *Germaine*, 99 U. S., at 510–511. See also *Burnap*, 252 U. S., at 515 ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet"). Accordingly, the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers." *Germaine*, 99 U. S., at 511.

Confining the term "Heads of Departments" in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power just as the Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people.

Such a limiting construction also ensures that we interpret that term in the Appointments Clause consistently with its interpretation in other constitutional provisions. In *Germaine*, see 99 U. S., at 511, this Court noted that the phrase "Heads of Departments" in the Appointments Clause must be read in conjunction with the Opinion Clause of Art. II, § 2, cl. 1. The Opinion Clause provides that the President "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments," and *Germaine* limited the meaning of "Executive Departmen[t]" to the Cabinet members.

The phrase "executive departments" also appears in § 4 of the Twenty-fifth Amendment, which empowers the Vice

President, together with a majority of the "principal officers of the executive departments," to declare the President "unable to discharge the powers and duties of his office." The Amendment was ratified February 10, 1967, and its language, of course, does not control our interpretation of a prior constitutional provision, such as the Appointments Clause.[4] Nevertheless, it is instructive that the hearings on the Twenty-fifth Amendment confirm that the term "department" refers to Cabinet-level entities:

> "[O]nly officials of Cabinet rank should participate in the decision as to whether presidential inability exists. . . . The intent . . . is that the Presidential appointees who direct the 10 executive departments named in 5 U. S. C. 1 [now codified as § 101], or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate . . . in determining inability." H. R. Rep. No. 203, 89th Cong., 1st Sess., 3 (1965).

Even if we were not persuaded that the Commissioner's view threatened to diffuse the appointment power and was contrary to the meaning of "Departmen[t]" in the Constitution, we still could not accept his treatment of the intent of Congress, which enacted legislation in 1969 with the express purpose of "making the Tax Court an Article I court rather than an executive agency." S. Rep. No. 91–552, p. 303 (1969). Congress deemed it "anomalous to continue to clas-

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[4] Because the language of the Twenty-fifth Amendment does not bind our interpretation of the Appointments Clause, the fact that the Amendment strictly limits the term "department" to those departments named in 5 U. S. C. § 101 does not provide a similar limitation on the term "Departmen[t]" within the meaning of the Appointments Clause. We do not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis.

sify" the Tax Court with executive agencies, *id.*, at 302, and questioned whether it was "appropriate for one executive agency [the pre-1969 tribunal] to be sitting in judgment on the determinations of another executive agency [the IRS]." *Ibid.*

Treating the Tax Court as a "Department" and its Chief Judge as its "Hea[d]" would defy the purpose of the Appointments Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform the Tax Court into an Article I legislative court. The Tax Court is not a "Departmen[t]."

Having so concluded, we now must determine whether it is one of the "Courts of Law," as *amicus* suggests. Petitioners and the Commissioner both take the position that the Tax Court cannot be a "Cour[t] of Law" within the meaning of the Appointments Clause because, they say, that term is limited to Article III courts.[5]

The text of the Clause does not limit the "Courts of Law" to those courts established under Article III of the Constitution. The Appointments Clause does not provide that Congress can vest appointment power only in "one supreme Court" and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction. Petitioners argue that Article II's reference to the "Courts of Law" must be limited to Article III courts because Article III courts are the only courts mentioned in the Constitution. It of course is true that the Constitution "nowhere makes reference to 'legislative courts.'" See *Glidden*, 370 U. S., at 543. But petitioners' argument fails nevertheless. We

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[5]The Commissioner has not been consistent in this position. Indeed, when the present litigation was in the Fifth Circuit, the Government advocated that the Tax Court is one of the "Courts of Law." Brief for Appellee in No. 89–4436 et al., pp. 47–51. It abandoned that position in the later case of *Samuels, Kramer & Co.* v. *Commissioner*, 930 F. 2d 975 (CA2 1991), and there urged that the Tax Court was a "Department." Brief for Appellee in No. 89–4436 et al., pp. 34–48.

agree with petitioners that the Constitution's terms are illuminated by their cognate provisions. This analytic method contributed to our conclusion that the Tax Court could not be a department. Petitioners, however, underestimate the importance of this Court's time-honored reading of the Constitution as giving Congress wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals. See, *e. g.*, *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828) (the judicial power of the United States is not limited to the judicial power defined under Article III and may be exercised by legislative courts); *Williams* v. *United States*, 289 U. S. 553, 565–567 (1933) (same).

Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States. In both *Canter* and *Williams*, this Court rejected arguments similar to the literalistic one now advanced by petitioners, that only Article III courts could exercise the judicial power because the term "judicial Power" appears only in Article III. In *Williams*, this Court explained that the power exercised by some non-Article III tribunals *is* judicial power:

> "The Court of Claims . . . undoubtedly . . . exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.
>
> "That judicial power apart from that article may be conferred by Congress upon legislative courts . . . is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter* . . . dealing with the territorial courts. . . . [T]he legislative courts possess and exercise judicial power . . . although not conferred in virtue of the third article of the Constitution." 289 U. S., at 565–566.

We cannot hold that an Article I court, such as the Court of Claims in *Williams* or the Territorial Court of Florida in

Canter, can exercise the judicial power of the United States and yet cannot be one of the "Courts of Law."

Nothing in *Buckley* v. *Valeo* contradicts this conclusion. While this Court in *Buckley* paraphrased the Appointments Clause to allow the appointment of inferior officers "by the President alone, by the heads of departments, or by the Judiciary," 424 U. S., at 132, we did not hold that "Courts of Law" consist only of the Article III judiciary. The appointment authority of the "Courts of Law" was not before this Court in *Buckley*. Instead, we were concerned with whether the appointment of Federal Elections Commissioners by Congress was constitutional under the Appointments Clause.

The narrow construction urged by petitioners and the Commissioner also would undermine longstanding practice. "[F]rom the earliest days of the Republic," see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 64 (1982), Congress provided for the creation of legislative courts and authorized those courts to appoint clerks, who were inferior officers. See, *e. g.*, *In re Hennen*, 13 Pet. 230 (1839). Congress' consistent interpretation of the Appointments Clause evinces a clear congressional understanding that Article I courts could be given the power to appoint. Because "'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta*, 488 U. S., at 401, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (concurring opinion), this longstanding interpretation provides evidence that Article I courts are not precluded from being "Courts of Law" within the meaning of the Appointments Clause.

Having concluded that an Article I court, which exercises judicial power, can be a "Cour[t] of Law" within the meaning of the Appointments Clause, we now examine the Tax Court's functions to define its constitutional status and its role in the constitutional scheme. See *Williams*, 289 U. S., at 563–567. The Tax Court exercises judicial, rather than

executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.

The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.

The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempts by fine or imprisonment, 26 U. S. C. § 7456(c); to grant certain injunctive relief, § 6213(a); to order the Secretary of the Treasury to refund an overpayment determined by the court, § 6512(b)(2); and to subpoena and examine witnesses, order production of documents, and administer oaths, § 7456(a). All these powers are quintessentially judicial in nature.

The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under § 10(e) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A). See *Motor Vehicle Mfrs.*

Assn. v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43–44 (1983).

The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands. Moreover, since the early 1800's, Congress regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who, as of at least 1839, were "inferior Officers" within the meaning of the Appointments Clause. See *In re Hennen*, 13 Pet., at 258. Including Article I courts, such as the Tax Court, that exercise judicial power and perform exclusively judicial functions among the "Courts of Law" does not significantly expand the universe of actors eligible to receive the appointment power.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

I agree with the Court that 26 U. S. C. § 7443A allows the Chief Judge of the Tax Court to assign special trial judges to preside over proceedings like those involved here, and join Parts I, II, and III of its opinion. I disagree, however, with the Court's decision to reach, as well as its resolution of, the Appointments Clause issue.

I

As an initial matter, I think the Court errs by entertaining petitioners' constitutional challenge on the merits. Petitioners not only failed to object at trial to the assignment of their case to a special trial judge, but expressly consented to that assignment. It was only after the judge ruled against them that petitioners developed their current concern over whether his appointment violated Article II, § 2, cl. 2, of the

Constitution. They raised this important constitutional question for the first time in their appeal to the Fifth Circuit. That court concluded that petitioners had "waived this objection" by consenting to the assignment of their case. 904 F. 2d 1011, 1015, n. 9 (1990). When we granted certiorari, we asked the parties to brief and argue the following additional question: "Does a party's consent to have its case heard by a special tax judge constitute a waiver of any right to challenge the appointment of that judge on the basis of the Appointments Clause, Art. II, § 2, cl. 2?" 498 U. S. 1066 (1991).

Petitioners would have us answer that question "no" by adopting a general rule that "structural" constitutional rights as a class simply *cannot* be forfeited, and that litigants are entitled to raise them at any stage of litigation. The Court neither accepts nor rejects that proposal—and indeed, does not even mention it, though the opinion does dwell upon the structural nature of the present constitutional claim, *ante*, at 878–880. Nor does the Court in any other fashion answer the question we specifically asked to be briefed, choosing instead to say that, in the present case, it will "exercise our discretion" to entertain petitioners' constitutional claim. *Ante*, at 879. Thus, when there occurs a similar forfeiture of an Appointments Clause objection—or of some other allegedly structural constitutional deficiency—the courts of appeals will remain without guidance as to whether the forfeiture must, or even may, be disregarded. (The Court refers to this case as "one of th[e] rare" ones in which forfeiture will be ignored, *ibid.*—but since all forfeitures of Appointments Clause rights, and arguably even all forfeitures of structural constitutional rights, can be considered "rare," this is hardly useful guidance.) Having asked for this point to be briefed and argued, and having expended our time in considering it, we should provide an answer. In my view the answer is that Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review. A party forfeits the right to advance on appeal a nonjuris-

dictional claim, structural or otherwise, that he fails to raise at trial. Although I have no quarrel with the proposition that appellate courts may, in truly exceptional circumstances, exercise discretion to hear forfeited claims, I see no basis for the assertion that the structural nature of a constitutional claim in and of itself constitutes such a circumstance; nor do I see any other exceptional circumstance in the present case. Cf. *Peretz* v. *United States*, *post*, at 954–955 (SCALIA, J., dissenting). I would therefore reject petitioners' sweeping proposition that structural constitutional rights as a class cannot be waived or forfeited and would refuse to entertain the constitutional challenge presented here.[1]

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U. S. 414, 444 (1944); see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239 (1940). Forfeiture[2] is "not a mere technicality and

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[1] I have no quarrel with the Court's decision to entertain petitioners' statutory claim on the merits, as that claim was resolved on the merits by the Court of Appeals. See *Virginia Bankshares, Inc.* v. *Sandberg*, *post*, at 1099, n. 8 (1991).

[2] The Court uses the term "waive" instead of "forfeit," see *ante*, at 878–880. The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the "intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, see, *e. g.*, *Levine* v. *United States*, 362 U. S. 610, 619 (1960) (right to public trial); *United States* v. *Bascaro*, 742 F. 2d 1335, 1365 (CA11 1984) (right against double jeopardy), cert. denied *sub nom. Hobson* v. *United States*, 472 U. S. 1017 (1985); *United States* v. *Whitten*, 706 F. 2d 1000, 1018, n. 7 (CA9 1983) (right to confront adverse witnesses), cert. denied, 465 U. S. 1100 (1984), but others may not, see, *e. g.*, *Johnson*, *supra* (right to counsel); *Patton* v. *United States*, 281 U. S. 276, 312 (1930) (right to trial by jury). A right that cannot be waived cannot be

is essential to the orderly administration of justice." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2472, p. 455 (1971). In the federal judicial system, the rules generally governing the forfeiture of claims are set forth in Federal Rules of Criminal Procedure 51 and 52(b) and Federal Rule of Civil Procedure 46. The Tax Court, which is not an Article III court, has adopted a rule virtually identical to the latter, Tax Court Rule 144. These rules reflect the principle that a trial on the merits, whether in a civil or criminal case, is the "main event," and not simply a "tryout on the road" to appellate review. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.

The blanket rule that "argument[s] premised on the Constitution's structural separation of powers [are] not a matter of personal rights and therefore [are] not waivable," Brief for Petitioners 43–44, would erode this cardinal principle of sound judicial administration. It has no support in principle or in precedent or in policy.

As to principle: Personal rights that happen to bear upon governmental structure are no more laden with public interest (and hence inherently nonwaivable by the individual) than many other personal rights one can conceive of. First

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forfeited by other means (at least in the same proceeding), but the converse is not true.

In this case, petitioners expressly consented to the Special Trial Judge's role. As far as my analysis is concerned, however, it would not matter if an even more inadvertent forfeiture were involved—that is, if petitioners had not even consented but had merely failed to object in timely fashion. I shall not try to retain the distinction between waiver and forfeiture throughout this opinion, since many of the sources I shall be using disregard it.

Amendment free-speech rights, for example, or the Sixth Amendment right to a trial that is "public," provide benefits to the entire society more important than many structural guarantees; but if the litigant does not assert them in a timely fashion, he is foreclosed. See, *e. g.*, *Head* v. *New Mexico Bd. of Examiners in Optometry*, 374 U. S. 424, 432–433, n. 12 (1963) (First Amendment); *Levine* v. *United States*, 362 U. S. 610, 619 (1960) (Sixth Amendment). Nor is it distinctively true of structural guarantees that litigants often may undervalue them. Many criminal defendants, for example, would prefer a trial from which the press is excluded.

It is true, of course, that a litigant's prior agreement to a judge's expressed intention to disregard a structural limitation upon his power cannot have any *legitimating* effect—*i. e.*, cannot render that disregard *lawful*. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no. But the question before us here involves the effect of waiver not *ex ante* but *ex post*—its effect not upon right but upon *remedy:* Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so—not, however, because the error was structural, but because, whether structural or not, it deprived the federal court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation, see, *e. g.*, *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18 (1951); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884); *Capron* v. *Van Noorden*, 2 Cranch 126, 127 (1804). Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i. e.*, the effect of approving, *ex*

ante, unlawful action by the appellate court itself. That this, rather than any principle of perpetual remediability of structural defects, is the basis for the rule of "nonwaivability" of lack of subject-matter jurisdiction is demonstrated by the fact that a final judgment cannot be attacked *collaterally*—*i. e.*, before a court that *does* have jurisdiction—on the ground that a subject-matter jurisdictional limitation (structural or not) was ignored. See, *e. g.*, *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982).

As to precedent: Petitioners place primary reliance on some broad language in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). We said in that case that "[w]hen these Article III limitations are at issue" (referring not to all structural limitations of the Constitution, but only to those of Article III, §§ 1 and 2) "notions of consent and waiver cannot be dispositive." 478 U. S., at 851. But the claim before us in *Schor* involved a particular sort of structural defect (a tribunal's exceeding its subject-matter jurisdiction) which, as I have just described, had traditionally been held nonwaivable on appeal in the context of Article III tribunals. To extend the same treatment to similar defects in the context of non-Article III tribunals is quite natural, whether or not it is analytically required. Cf., *e. g.*, *Clapp* v. *Commissioner*, 875 F. 2d 1396, 1399 (CA9 1989) ("While the Tax Court is an Article I court, . . . the few cases discussing the differences between the Tax Court and an Article III court indicate that questions of Tax Court jurisdiction are to be resolved in the same manner as for an Article III court"). It is clear from our opinion in *Schor* that we had the analogy to Article III subject-matter jurisdiction in mind. "To the extent that this structural principle is implicated in a given case," we said, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, §2."

478 U. S., at 850–851.[3] I would not extend that nonwaiver rule—a traditional rule in its application to Article III courts, and understandably extended to other federal adjudicative tribunals—to structural defects that do not call into question the jurisdiction of the forum. The subject-matter jurisdiction of the forum that issued the judgment, the Tax Court, is not in question in the present case.

Petitioners only other appeal to precedent is *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962). That case did address a nonjurisdictional structural defect that had not been raised below. As the Court explains, however, that was a structural defect that went to the validity of the very proceeding under review, *ante*, at 879, as opposed to one that merely affected the validity of the claim—for example, improper appointment of the Executive officer who issued the regulation central to the controversy. That was considered significant by the only opinion in the case (that of Justice Harlan, joined by Justices Brennan and Stewart) to address the waiver point. ("The alleged defect of authority here relates to basic constitutional protections *designed in part for the benefit of litigants*." *Id.*, at 536 (emphasis added).) The formulation petitioners advance, of course, is much broader than that. ("[A]n argument premised on the Constitution's structural separation of powers is not a matter of personal rights and

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[3] Ironically enough, the categorical "no-waiver" rule that petitioners propose would destroy the very parallelism between administrative and judicial tribunals that *Schor* sought to achieve. For we have held that, in the administrative context, the use of unauthorized personnel to conduct a hearing (a hearing examiner not properly appointed pursuant to the Administrative Procedure Act) would not justify judicial reversal of the agency decision where no objection was lodged before the agency itself: "[W]e hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952).

therefore *is not waivable.*" Brief for Petitioners 43–44 (emphasis added)). "There can be no hierarchy among separation of powers principles, in which some are fundamental and nonwaivable while the vindication of others may be relegated to the vagaries of individual litigation strategies." *Id.*, at 45.) Even more important, Justice Harlan's plurality opinion in *Glidden* does not stand for the proposition that forfeiture can *never* be imposed, but rather the more limited proposition, which the Court reiterates today, that forfeiture need not *always* be imposed.

Several recent opinions flatly contradict petitioners' blanket assertion that structural claims cannot be waived. Surely under our jurisprudence the so-called negative Commerce Clause is structural. See *Dennis* v. *Higgins*, 498 U. S. 439, 447 (1991). And surely the supposed guarantee against waivability must apply in state courts as well as in federal courts, since according to petitioners it emanates from the structural rights themselves. Yet only last Term, in *Jimmy Swaggart Ministries* v. *Board of Equalization of California*, 493 U. S. 378, 397 (1990), we declined to consider a negative Commerce Clause challenge to a state tax because state courts had found the issue procedurally barred as a result of petitioner's failure to raise it in his administrative proceeding for a tax refund. And in *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 414 (1982), we declined to reach a negative Commerce Clause claim in litigation arising in the federal courts; we remanded the case for consideration of that issue by the Court of Appeals, "*if it was properly raised below.*" (Emphasis added.) The Federal Courts of Appeals (even after *Schor*) have routinely applied the ordinary rules of forfeiture to structural claims not raised below. See, *e. g.*, *United States* v. *Doremus*, 888 F. 2d 630, 633, n. 3 (CA9 1989) (separation of powers claims), cert. denied, 498 U. S. 1046 (1991); *Opdyke Investment Co.* v. *Detroit*, 883 F. 2d 1265, 1276 (CA6 1989) (same); *Interface Group, Inc.* v.

Massachusetts Port Authority, 816 F. 2d 9, 16 (CA1 1987) (Breyer, J.) (Supremacy and Commerce Clause claims).

Finally, as to policy: The need for the traditional forfeiture rule—in cases involving structural claims as in all others—is obvious. Without that incentive to raise legal objections as soon as they are available, the time of lower court judges and of juries would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less complete. Besides inviting these evils, the categorical rule petitioners advance would require the development of a whole new body of jurisprudence concerning which constitutional provisions are "structural"—a question whose answer is by no means clear. Cf. Sunstein, Government Control of Information, 74 Calif. L. Rev. 889, 915 (1986) (arguing that the First Amendment is structural). Moreover, since that rigid rule would cut so much against the grain of reason and practice, it would have the side effect of distorting substantive law. The maxim *volenti non fit injuria* has strong appeal in human affairs, and, by requiring it to be absolutely and systematically disregarded in cases involving structural protections of the Constitution, we would incline ourselves towards finding that no such structural protection exists.

Thus, the structural nature of the claim here is not sufficient reason to ignore its forfeiture—and the Court (though it discusses the virtues of structure at some length) does not pretend otherwise. There must be some additional reason, then, why the Court "exercise[s] our discretion," *ante*, at 879, to disregard the forfeiture. To disregard it without sufficient reason is the exercise not of discretion but of whimsy. Yet beyond its discussion of structure, the only reason the Court gives is no reason at all: "we are faced with a constitutional challenge that is neither frivolous nor disingenuous," *ibid.* That describes the situation with regard to the vast majority of forfeited claims raised on appeal. As we make clear in another case decided this very day, waiver generally

extends not merely to "frivolous" and "disingenuous" challenges, but even to "[t]he most basic rights of criminal defendants." *Peretz*, *post*, at 936. Here, petitioners expressly consented to the Special Trial Judge. Under 26 U. S. C. § 7443A, the Chief Judge of that court has broad discretion to assign cases to special trial judges. Any party who objects to such an assignment, if so inclined, can easily raise the constitutional issue pressed today. Under these circumstances, I see no reason why this should be included among those "rare cases in which we should exercise our discretion," *ante*, at 879, to hear a forfeited claim.

II

Having struggled to reach petitioners' Appointments Clause objection, the Court finds it invalid. I agree with that conclusion, but the reason the Court assigns is in my view both wrong and full of danger for the future of our system of separate and coequal powers.

The Appointments Clause provides:

> "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2.

I agree with the Court that a special trial judge is an "inferior Office[r]" within the meaning of this Clause, with the result that, absent Presidential appointment, he must be appointed by a court of law or the head of a department. I do not agree, however, with the Court's conclusion that the Tax Court is a "Cour[t] of Law" within the meaning of this provision. I would find the appointment valid because the Tax Court is a "Departmen[t]" and the Chief Judge is its head.

A

A careful reading of the Constitution and attention to the apparent purpose of the Appointments Clause make it clear that the Tax Court cannot be one of those "Courts of Law"

referred to there. The Clause does not refer generally to "Bodies exercising judicial Functions," or even to "Courts" generally, or even to "Courts of Law" generally. It refers to "*the* Courts of Law." Certainly this does not mean *any* "Cour[t] of Law" (the Supreme Court of Rhode Island would not do). The definite article "the" obviously narrows the class of eligible "Courts of Law" to those courts of law envisioned by the Constitution. Those are Article III courts, and the Tax Court is not one of them.

The Court rejects this conclusion because the Appointments Clause does not (in the style of the Uniform Commercial Code) contain an explicit cross-reference to Article III. *Ante*, at 888–889. This is no doubt true, but irrelevant. It is equally true that Article I, § 8, cl. 9, which provides that Congress may "constitute Tribunals inferior to the supreme Court," does not explicitly say "Tribunals under Article III, below." Yet, this power "plainly relates to the 'inferior Courts' provided for in Article III, § 1; it has never been relied on for establishment of any other tribunals." *Glidden Co.* v. *Zdanok*, 370 U. S., at 543 (opinion of Harlan, J.); see also 3 J. Story, Commentaries on the Constitution of the United States § 1573, p. 437 (1833). Today's Court evidently does not appreciate, as Chief Justice Marshall did, that the Constitution does not "partake of the prolixity of a legal code," *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). It does not, like our opinions, bristle with "*supra*s," "*infra*s," and footnotes. Instead of insisting upon such legalisms, we should, I submit, follow the course mapped out in *Buckley* v. *Valeo*, 424 U. S. 1, 124 (1976) *(per curiam)*, and examine the Appointments Clause of the Constitution in light of the "cognate provisions" of which it is a central feature: Article I, Article II, and Article III. The only "Courts of Law" referred to there are those authorized by Article III, § 1, whose judges serve during good behavior with undiminishable salary. Art. III, § 1. See *Glidden Co.* v. *Zdanok*, *supra*, at 543 (opinion of Harlan, J.); *United States* v. *Mouat*, 124

U. S. 303, 307 (1888) ("courts of justice") (dictum). The Framers contemplated no other national judicial tribunals. "According to the plan of the convention, *all* judges who may be appointed by the United States are to hold their offices *during good behavior* . . . ." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (second emphasis in original).

We recognized this in *Buckley*, *supra*, and it was indeed an essential part of our reasoning. Responding to the argument that a select group of Congressmen was a "Department," we said:

> "The phrase 'Heads of Departments,' used as it is in conjunction with the phrase 'Courts of Law,' suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the 'Courts of Law,' the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language 'Heads of Departments' in this part of cl. 2.
>
> "Thus, with respect to four of the six voting members of the Commission, neither the President, the head of any department, *nor the Judiciary* has any voice in their selection." *Id.*, at 127 (emphasis added).

The whole point of this passage is that "the Heads of Departments" must reasonably be understood to refer exclusively to the Executive Branch (thereby excluding officers of Congress) because "the Courts of Law" obviously refers exclusively to the Judicial Branch. We were right in *Buckley*, and the Court is wrong today.

Even if the Framers had no particular purpose in making the Appointments Clause refer only to Article III courts, we would still of course be bound by that disposition. In fact, however, there is every reason to believe that the Appointments Clause's limitation to Article III tribunals was adopted

with calculation and forethought, faithfully implementing a considered political theory for the appointment of officers.

The Framers' experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption.[4] The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, § 6, cl. 2. See *Buckley*, *supra*, at 124. But real, if less obvious, dangers remained. Even if legislators could not appoint themselves, they would be inclined to appoint their friends and supporters. This proclivity would be unchecked because of the lack of accountability in a multimember body—as

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[4] The Court apparently thinks that the Appointments Clause was designed to check executive despotism. *Ante*, at 883–884. This is not what we said in *Buckley* v. *Valeo*, 424 U. S. 1, 129 (1976), and it is quite simply contrary to historical fact. The quotations on which the Court relies describe abuses by the unelected royal governors and the Crown, who possessed the power to create and fill offices. The drafters of several early State Constitutions reacted to these abuses by lodging the appointment power in the legislature. See, *e. g.*, Va. Const. (1776) (legislature appoints judges); cf. Articles of Confederation, Art. IX (Congress appoints courts and officers of land forces). Americans soon learned, however, that "in a representative republic where the executive magistracy is carefully limited . . . it is against the enterprising ambition of the [legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No. 48, p. 309 (C. Rossiter ed. 1961) (J. Madison). Soon after the revolution, "[t]he appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." G. Wood, The Creation of The American Republic, 1776–1787, p. 407 (1969). By 1780, States were reacting to *these* abuses by reposing appointment authority in the executive. See Mass. Const., Part The Second, Chapter II, § 1, Art. IX (1780); N. H. Const. (1784) (officers appointed by president and a council). On legislative despotism, see generally Wood, *supra*, at 403–409. The Framers followed the lead of these later Constitutions. The Appointments Clause is, intentionally and self-evidently, a limitation on *Congress*.

James Wilson pointed out in his criticism of a multimember executive:

> "[A]re impartiality and fine discernment likely to predominate in a numerous [appointing] body? In proportion to their own number, will be the number of their friends, favorites and dependents. An office is to be filled. A person nearly connected, by some of the foregoing ties, with one of those who [is] to vote in filling it, is named as a candidate. . . . Every member, who gives, on his account, a vote for his friend, will expect the return of a similar favor on the first convenient opportunity. In this manner, a reciprocal intercourse of partiality, of interestedness, of favoritism, perhaps of venality, is established; and in no particular instance, is there a practicability of tracing the poison to its source. Ignorant, vicious, and prostituted characters are introduced into office; and some of those, who voted, and procured others to vote for them, are the first and loudest in expressing their astonishment, that the door of admission was ever opened to men of their infamous description. The suffering people are thus wounded and buffeted, like Homer's Ajax, in the dark; and have not even the melancholy satisfaction of knowing by whom the blows are given." 1 Works of James Wilson 359–360 (J. Andrews ed. 1896).

See also Essex Result, in Memoir of Theophilus Parsons 381–382 (1859); The Federalist No. 76, pp. 455–457 (C. Rossiter ed. 1961) (A. Hamilton). And not only would unaccountable legislatures introduce their friends into necessary offices, they would create unnecessary offices into which to introduce their friends. As James Madison observed:

> "The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the cre-

> ation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other." Madison's Observations on Jefferson's Draft of a Constitution for Virginia, reprinted in 6 Papers of Thomas Jefferson 308, 311 (J. Boyd ed. 1952).

For these good and sufficient reasons, then, the federal appointment power was removed from Congress. The Framers knew, however, that it was not enough simply to define in writing who would exercise this power or that. "After discriminating . . . in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task [was] to provide some practical security for each, against the invasion of the others." The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison). Invasion by the Legislature, of course, was the principal threat, since the "legislative authority . . . possesses so many means of operating on the motives of the other departments." *Id.*, No. 49, p. 314 (J. Madison). It can "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments," *id.*, No. 48, p. 310 (J. Madison), and thus control the nominal actions (*e. g.*, appointments) of the other branches. Cf. T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1955).

Thus, it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional. See Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 920–924 (1990). One of the most obvious and necessary, however, was a permanent salary. Art. II, § 1. Without this, "the separation of the

executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him." The Federalist No. 73, p. 441 (C. Rossiter ed. 1961) (A. Hamilton). See also *id.*, No. 51, p. 321 (J. Madison); Mass. Const., Part The Second, Chapter II, § 1, Art. XIII (1780).

A power of appointment lodged in a President surrounded by such structural fortifications could be expected to be exercised independently, and not pursuant to the manipulations of Congress. The same is true, to almost the same degree, of the appointment power lodged in the heads of departments. Like the President, these individuals possess a reputational stake in the quality of the individuals they appoint; and though they are not themselves able to resist congressional encroachment, they are directly answerable to the President, who is responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants.

Like the President, the Judicial Branch was separated from Congress not merely by a paper assignment of functions, but by endowment with the means to resist encroachment—foremost among which, of course, are life tenure (during "good behavior") and permanent salary. These structural accoutrements not only assure the fearless adjudication of cases and controversies, see The Federalist Nos. 78, 79 (A. Hamilton); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 57–60 (1982) (opinion of Brennan, J.); they also render the Judiciary a potential repository of appointment power free of congressional (as well as Presidential) influence. In the same way that depositing appointment power in a fortified President and his lieutenants ensures an *actual* exclusion of the legislature from appointment, so too does reposing such power in an Article III court. The Court's holding, that Congress may deposit

such power in "legislative courts," without regard to whether their personnel are either Article III judges *or* "Heads of Departments," utterly destroys this carefully constructed scheme. And the Court produces this result, I remind the reader, not because of, but *in spite of*, the apparent meaning of the phrase "the Courts of Law."

B

Having concluded, against all odds, that "the Courts of Law" referred to in Article II, § 2, are not the courts of law established by Article III, the Court is confronted with the difficult problem of determining what courts of law they *are*. It acknowledges that they must be courts which exercise "the judicial power of the United States" and concludes that the Tax Court is such a court—even though it is not an Article III court. This is quite a feat, considering that Article III begins "*The* judicial Power of the United States"—not "*Some of* the judicial Power of the United States," or even "*Most of* the judicial Power of the United States"—"shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Despite this unequivocal text, the Court sets forth the startling proposition that "the judicial power of the United States is not limited to the judicial power defined under Article III." *Ante*, at 889. It turns out, however—to our relief, I suppose it must be said—that this is really only a pun. "The judicial power," as the Court uses it, bears no resemblance to the constitutional term of art we are all familiar with, but means only "the power to adjudicate in the manner of courts." So used, as I shall proceed to explain, the phrase covers an infinite variety of individuals exercising *executive* rather than *judicial* power (in the constitutional sense), and has nothing to do with the separation of powers or with any other characteristic that might cause one to believe *that* is what was meant by "the Courts of Law." As far as I can tell, the only thing to be said for this approach is that it makes the Tax

Court a "Cour[t] of Law"—which is perhaps the object of the exercise.

I agree with the unremarkable proposition that "Congress [has] wide discretion to assign the task of adjudication in cases arising under federal law to legislative tribunals." *Ante*, at 889. Congress may also assign that task to subdivisions of traditional executive departments, as it did in 1924 when it created the Tax Court's predecessor, the Tax Board of Appeals—or to take a more venerable example, as it did in 1791 when it created within the Treasury Department the Comptroller of the United States, who "decide[d] on appeal, without further review by the Secretary, all claims concerning the settlement of accounts." Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 238 (1989); see 1 Stat. 66. Such tribunals, like any other administrative board, exercise the executive power, not the judicial power of the United States. They are, in the words of the great Chief Justice, "incapable of receiving [the judicial power]"—unless their members serve for life during good behavior and receive permanent salary. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546 (1828) (Marshall, C. J.).

It is no doubt true that all such bodies "adjudicate," *i. e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power, as we recognized almost a century and a half ago.

> "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, [*Martin* v. *Mott*,]

> 12 Wheat. 19 [(1827)], or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280 (1856).

Accord, Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 264–265 (1990). The first Patent Board, which consisted of Thomas Jefferson, Henry Knox, and Edmund Randolph in their capacities as Secretary of State, Secretary of War, and Attorney General, respectively, 1 Stat. 109, 110 (1790), adjudicated the patentability of inventions, sometimes hearing argument by petitioners. See 18 J. Pat. Off. Soc. 68–69 (July 1936). They were exercising the *executive* power. See Easterbrook, "Success" and the Judicial Power, 65 Ind. L. J. 277, 280 (1990). Today, the Federal Government has a corps of administrative law judges numbering more than 1,000, whose principal statutory function is the conduct of adjudication under the Administrative Procedure Act (APA), see 5 U. S. C. §§ 554, 3105. They are all *executive* officers. "Adjudication," in other words, is no more an "inherently" judicial function than the promulgation of rules governing primary conduct is an "inherently" legislative one. See *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911); APA, 5 U. S. C. § 553 ("Rule making").

It is true that Congress *may* commit the sorts of matters administrative law judges and other executive adjudicators now handle to Article III courts—just as some of the matters now in Article III courts could instead be committed to executive adjudicators. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United

States, as it may deem proper." *Murray's Lessee, supra*, at 284. See also *Ex parte Bakelite Corp.*, 279 U. S. 438, 451 (1929). Congress could, for instance, allow direct review by the courts of appeals of denials of Social Security benefits. It could instead establish the Social Security Court—composed of judges serving 5-year terms—within the Social Security Administration. Both tribunals would perform identical functions, but only the former would exercise the judicial power.

In short, given the performance of adjudicatory functions by a federal officer, it is the identity of the officer—not something intrinsic about the mode of decisionmaking or type of decision—that tells us whether the judicial power is being exercised. "[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." *Bowsher* v. *Synar*, 478 U. S. 714, 749 (1986) (STEVENS, J., concurring in judgment). Cf. *INS* v. *Chadha*, 462 U. S. 919, 953, n. 16 (1983). Where adjudicative decisionmakers do not possess life tenure and a permanent salary, they are "incapable of exercising any portion of the judicial power." *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

The Tax Court is indistinguishable from my hypothetical Social Security Court. It reviews determinations by Executive Branch officials (the Internal Revenue Service) that this much or that much tax is owed—a classic executive function. For 18 years its predecessor, the Board of Tax Appeals, did the very same thing, see H. Dubroff, The United States Tax Court 47–175 (1979), and no one suggested that body exercised "the judicial power." We held just the opposite:

> "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." *Old*

Colony Trust Co. v. *Commissioner*, 279 U. S. 716, 725 (1929) (Taft, C. J.).

Though renamed "the Tax Court of the United States" in 1942, it remained "an independent agency in the Executive Branch," 26 U. S. C. § 1100 (1952 ed.), and continued to perform the same function. As an *executive* agency, it possessed many of the accoutrements the Court considers "quintessentially judicial," *ante*, at 891. It administered oaths, for example, and subpoenaed and examined witnesses, § 1114; its findings were reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury," § 1141(a). This Court continued to treat it as an administrative agency, akin to the Federal Communications Commission (FCC) or the National Labor Relations Board (NLRB). See *Dobson* v. *Commissioner*, 320 U. S. 489, 495–501 (1943).

When the Tax Court was statutorily denominated an "Article I Court" in 1969, its judges did not magically acquire the judicial power. They still lack life tenure; their salaries may still be diminished; they are still removable by the President for "inefficiency, neglect of duty, or malfeasance in office." 26 U. S. C. § 7443(f). (In *Bowsher* v. *Synar*, *supra*, at 729, we held that these latter terms are "very broad" and "could sustain removal . . . for any number of actual or perceived transgressions.") How anyone with these characteristics can exercise *judicial* power "independent . . . [of] the Executive Branch" is a complete mystery. It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 451, n. 43 (1989). See also *Northern Pipeline*, 458 U. S., at 113 (WHITE, J., dissenting) (equating administrative agencies and Article I courts); *Samuels, Kramer & Co.* v. *Commissioner*, 930 F. 2d 975, 992–993 (CA2 1991) (collecting academic authorities for same proposition).

In seeking to establish that "judicial power" in some constitutionally significant sense—in a sense different from the adjudicative exercise of *executive* power—can be exercised by someone other than an Article III judge, the Court relies heavily upon the existence of territorial courts. *Ante*, at 889–891. Those courts have nothing to do with the issue before us.[5] I agree that they do not exercise the national *executive* power—but neither do they exercise any national *judicial* power. They are neither Article III courts nor Article I courts, but Article IV courts—just as territorial governors are not Article I executives but Article IV executives.

> "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. . . . In legislating for them, Congress exercises the combined powers of the general, and of a *state* government." *American Ins. Co.* v. *Canter*, 1 Pet., at 546 (Marshall, C. J.) (emphasis added).

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[5] Sadly, the Court also relies on dicta in *Williams* v. *United States*, 289 U. S. 553 (1933), an opinion whose understanding of the principles of separation of powers ought not inspire confidence, much less prompt emulation. It includes, for example, the notion that all disputes over which Article III provides jurisdiction can only be committed to Article III courts, *id.*, at 580–581; see also D. Currie, Federal Courts 145–146 (1982)—which would make the Tax Court unconstitutional. *Williams* has been declared an "intellectual disaster" by commentators. P. Bator, D. Meltzer, P. Miskin, & D. Shapiro, Hart & Wechsler's The Federal Courts and The Federal System 468 (3d ed. 1988); Bator, The Constitution as Architecture: Legislative And Administrative Courts Under Article III, 65 Ind. L. J. 233, 242–243, n. 30 (1990) ("I could devote a whole lecture to the ways in which [the reasoning of *Williams*] is erroneous").

Or as the Court later described it:

> "[Territories] are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control." *Benner* v. *Porter*, 9 How. 235, 242 (1850).

Thus, Congress may endow territorial governments with a plural executive; it may allow the executive to legislate; it may dispense with the legislature or judiciary altogether. It should be obvious that the powers exercised by territorial courts tell us nothing about the nature of an entity, like the Tax Court, which administers the general laws of the Nation. See *Northern Pipeline*, *supra*, at 75–76 (opinion of Brennan, J.).

The Court claims that there is a "longstanding practice" of permitting Article I courts to appoint inferior officers. *Ante*, at 890. I am unaware of such a practice. Perhaps the Court means to refer not to Article I courts but to the territorial courts just discussed, in which case the practice would be irrelevant. As I shall discuss below, an Article I court (such as the Tax Court) that is not within any other department would be able to have its inferior officers appointed by its chief judge—not under the "Courts of Law" provision of Article II, § 2, but under the "Heads of Departments" provision; perhaps it is that sort of practice the Court has in mind. It is certain, in any case, that no decision of ours has ever approved the appointment of an inferior officer by an Article I court. *Ex parte Hennen*, 13 Pet. 230 (1839), which the Court cites, involved appointment by an Article III tribunal.

III

Since the Tax Court is not a court of law, unless the Chief Judge is the head of a department, the appointment of the Special Trial Judge was void. Unlike the Court, I think he is.

I have already explained that the Tax Court, like its predecessors, exercises the executive power of the United States. This does not, of course, suffice to make it a "Departmen[t]" for purposes of the Appointments Clause. If, for instance, the Tax Court were a subdivision of the Department of the Treasury—as the Board of Tax Appeals used to be—it would not qualify. In fact, however, the Tax Court is a free-standing, self-contained entity in the Executive Branch, whose Chief Judge is removable by the President (and, save impeachment, no one else). Nevertheless, the Court holds that the Chief Judge is not the head of a department.

It is not at all clear what the Court's reason for this conclusion is. I had originally thought that the Court was adopting petitioners' theory—wrong, but at least coherent—that "Heads of Departments" means Cabinet officers. This is suggested by the Court's reliance upon the dictum in *Burnap* v. *United States*, 252 U. S. 512, 515 (1920), to the effect that the head of a department must be "'the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, *who is a member of the Cabinet*,'" *ante*, at 886 (emphasis added); by the Court's observation that "[t]he Cabinet-level departments are limited in number and easily identified," *ibid.*; and by its reliance upon the fact that in the Twenty-fifth Amendment "the term 'department' refers to Cabinet-level entities," *ante*, at 887. Elsewhere, however, the Court seemingly disclaims Cabinet status as the criterion, see *ante*, at 887, n. 4, and says that the term "Departmen[t]" means "executive divisions *like* the Cabinet-level departments," *ante*, at 886 (emphasis added). Unfortunately, it never specifies what characteristic it is that causes an agency to *be* "like a Cabinet-level department," or even provides any intelligible clues as to what it might have in mind. It quotes a congressional Committee Report that seemingly equates Cabinet status with inclusion within the statutory defintion of "'department'" in 5 U. S. C. § 101, *ante*, at 887 (quoting H. R. Rep.

No. 203, 89th Cong., 1st Sess., 3 (1965)), but this hint is canceled by a footnote making it clear that "Cabinet-like" character, whatever it is, is *not* "strictly limit[ed]" by that provision, *ante*, at 887, n. 4. Its approving quotation of *Burnap*'s reference to "a great division of the executive branch" might invite the guess that numerosity is the key—but the Department of Education has fewer than 5,000 employees, and the FCC, which the Court also appears willing to consider such a "'great division,'" *ante*, at 886, fewer than 1,800. See Employment and Trends as of March 1991, Office of Personnel Management, Table 2. The Court reserves the right to consider as "Cabinet-like" and hence as "Departments" those agencies which, above all others, are at the farthest remove from Cabinet status, and whose heads are specifically designed *not* to have the quality that the Court earlier thinks important, of being "subject to the exercise of political oversight and shar[ing] the President's accountability to the people," *ante*, at 886—namely, independent regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission, *ante*, at 887, n. 4. Indeed, lest any conceivable improbability be excluded, the Court even reserves the right to consider as a "Departmen[t]" an entity that is not headed by an officer of the United States—the Federal Reserve Bank of St. Louis, whose president is appointed in none of the manners constitutionally permitted for federal officers, but rather by a Board of Directors, two-thirds of whom are elected by regional banks, see 12 U. S. C. §§ 302, 304, and 341. It is as impossible to respond to this random argumentation as it is to derive a comprehensible theory of the appointments power from it. I shall address, therefore, what was petitioners' point, what I originally took to be the point of the Court's opinion, and what is the only trace of a flesh-and-blood point that subsists: the proposition that "Departmen[t]" means "Cabinet-level agency."

There is no basis in text or precedent for this position. The term "Cabinet" does not appear in the Constitution, the

Founders having rejected proposals to create a Cabinet-like entity. See H. Learned, The President's Cabinet 74–94 (1912); E. Corwin, The President 97, 238–240 (5th rev. ed. 1984). The existence of a Cabinet, its membership, and its prerogatives (except to the extent the Twenty-fifth Amendment speaks to them), are entirely matters of Presidential discretion. Nor does any of our cases hold that "the Heads of Departments" are Cabinet members. In *United States* v. *Germaine*, 99 U. S. 508 (1879), we merely held that the Commissioner of Pensions, an official *within* the Interior Department, was not the head of a department. And, in *Burnap*, *supra*, we held that the Bureau of Public Buildings and Grounds, a bureau *within* the War Department, was not a department.

The Court's reliance on the Twenty-fifth Amendment is misplaced. I accept that the phrase "the principal officers of the executive departments" is limited to members of the Cabinet. It is the structural composition of the phrase, however, and not the single word "departments" which gives it that narrow meaning—"the principal officers" of the "executive departments" in gross, rather than (as in the Opinions Clause) "the principal Officer in each of the executive Departments," or (in the Appointments Clause) simply "the Heads" (not "principal Heads") "of Departments."

The only history on the point also militates against the Court's conclusion. The 1792 Congress passed an "Act to establish the Post-Office and Post Roads within the United States," creating a Postmaster General and empowering him to appoint "an assistant, and deputy postmasters, at all places where such may be found necessary." § 3, 1 Stat. 234. President Washington did not bring the Postmaster into his Cabinet. See Learned, *supra*, at 233–249. It seems likely that the Assistant Postmaster General and Deputy Postmasters were inferior officers—which means either that "the Heads of Departments" include principal officers other than the Cabinet, or that the Second Congress and President

Washington did not understand the Appointments Clause. In any case, it is silly to think that the Second Congress (or any later Congress) was supposed to *guess* whether the President would bring the new agency into his Cabinet in order to determine how the appointment of its inferior officers could be made.

Modern practice as well as original practice refutes the distinction between Cabinet and non-Cabinet agencies. Congress has empowered non-Cabinet agencies to appoint inferior officers for quite some time. See, *e. g.*, 47 U. S. C. § 155(f) (FCC—managing director); 15 U. S. C. § 78d(b) (Securities and Exchange Commission—"such officers . . . as may be necessary"); 15 U. S. C. § 42 (Federal Trade Commission—secretary); 7 U. S. C. § 4a(c) (Commodity Futures Trading Commission—general counsel). In fact, I know of very few inferior officers in the independent agencies who are appointed by the President, and of none who is appointed by the head of a Cabinet department. The Court's interpretation of "Heads of Departments" casts into doubt the validity of many appointments and a number of explicit statutory authorizations to appoint.

A number of factors support the proposition that "Heads of Departments" includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch. It is quite likely that the "Departments" referred to in the Opinions Clause ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments," Art. II, § 2) are the same as the "Departments" in the Appointments Clause. See *Germaine*, *supra*, at 511. In the former context, it seems to me, the word must reasonably be thought to include all independent establishments. The purpose of the Opinions Clause, presumably, was to assure the President's ability to get a written opinion on all important matters. But if the "Departments" it referred to were only Cabinet departments,

it would not assure the current President the ability to receive a written opinion concerning the operations of the Central Intelligence Agency, an agency that is not within any other department, and whose Director is not a member of the Cabinet.

This evident meaning—that the term "Departments" means all independent executive establishments—is also the only construction that makes sense of Article II, § 2's sharp distinction between principal officers and inferior officers. The latter, as we have seen, can by statute be made appointable by "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." Officers that are not "inferior Officers," however, *must* be appointed (unless the Constitution itself specifies otherwise, as it does, for example, with respect to officers of Congress) *by the President, "by and with the Advice and Consent of the Senate."* The obvious purpose of this scheme is to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval; only officers "inferior," *i. e.*, subordinate, to those can be appointed in some other fashion. If the Appointments Clause is read as I read it, all inferior officers can be made appointable by their ultimate (sub-Presidential) superiors; as petitioners would read it, only those inferior officers whose ultimate superiors happen to be Cabinet members can be. All the other inferior officers, if they are to be appointed by an Executive official at all, must be appointed by the President himself or (assuming cross-department appointments are permissible) by a Cabinet officer who has no authority over the appointees. This seems to me a most implausible disposition, particularly since the makeup of the Cabinet is not specified in the Constitution, or indeed the concept even mentioned. It makes no sense to create a system in which the inferior officers of the Environmental Protection Agency,

for example—which may include, *inter alios*, bureau chiefs, the general counsel, and administrative law judges—must be appointed by the President, the courts of law, or the "Secretary of Something Else."

In short, there is no reason, in text, judicial decision, history, or policy, to limit the phrase "the Heads of Departments" in the Appointments Clause to those officials who are members of the President's Cabinet. I would give the term its ordinary meaning, something which Congress has apparently been doing for decades without complaint. As an American dictionary roughly contemporaneous with adoption of the Appointments Clause provided, and as remains the case, a department is "[a] separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person . . . ." 1 N. Webster, American Dictionary 58 (1828). I readily acknowledge that applying this word to an entity such as the Tax Court would have seemed strange to the Founders, as it continues to seem strange to modern ears. But that is only because the Founders did not envision that an independent establishment of such small size and specialized function would be created. They chose the word "Departmen[t]," however, not to connote size or function (much less Cabinet status), but separate organization—a connotation that still endures even in colloquial usage today ("that is not my department"). The Constitution is clear, I think, about the chain of appointment and supervision that it envisions: Principal officers could be permitted by law to appoint their subordinates. That should subsist, however much the nature of federal business or of federal organizational structure may alter.

I must confess that in the case of the Tax Court, as with some other independent establishments (notably, the so-called "independent regulatory agencies" such as the FCC and the Federal Trade Commission) permitting appointment of inferior officers by the agency head may not ensure the

high degree of insulation from congressional control that was the purpose of the appointments scheme elaborated in the Constitution. That is a consequence of our decision in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), which approved congressional restriction upon arbitrary dismissal of the heads of such agencies by the President, a scheme avowedly designed to made such agencies less accountable to him, and hence he less responsible for them. Depending upon how broadly one reads the President's power to dismiss "for cause," it may be that he has no control over the appointment of inferior officers in such agencies; and if those agencies are publicly regarded as beyond his control—a "headless Fourth Branch"—he may have less incentive to care about such appointments. It could be argued, then, that much of the *raison d'être* for permitting appointive power to be lodged in "Heads of Departments," see *supra*, at 903–908, does not exist with respect to the heads of *these* agencies, because they, in fact, will not be shored up by the President and are thus not resistant to congressional pressures. That is a reasonable position—though I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor. But in any event it is not a reasonable position that supports the Court's decision today—both because a "Cour[t] of Law" artificially defined as the Court defines it is even *less* resistent to those pressures, and because the distinction between those agencies that are subject to full Presidential control and those that are not is entirely unrelated to the distinction between Cabinet agencies and non-Cabinet agencies, and to all the other distinctions that the Court successively embraces. (The Central Intelligence Agency and the Environmental Protection Agency, for example, though not Cabinet agencies or components of Cabinet agencies, are not "independent" agencies in the sense of independence from Presidential control.)

In sum, whatever may be the distorting effects of later innovations that this Court has approved, considering the Chief Judge of the Tax Court to be the head of a department seems to me the only reasonable construction of Article II, § 2.

* * *

For the above reasons, I concur in the judgment that the decision below must be affirmed.

PERETZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 90–615. Argued April 23, 1991—Decided June 27, 1991

In *Gomez* v. *United States*, 490 U. S. 858, this Court held that the selection of a jury in a felony trial without a defendant's consent is not one of the "additional duties" that magistrates may be assigned under the Federal Magistrates Act. That decision rested on the lack of both an express statutory provision for *de novo* review and an explicit congressional intent to permit magistrates to conduct *voir dire* absent the parties' consent. And it was compelled by concerns that a defendant might have a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial and that the procedure deprived an individual of an important privilege, if not a right. In this case, petitioner Peretz consented to the assignment of a Magistrate to conduct the *voir dire* and supervise the jury selection for his felony trial, never asked the District Court to review the Magistrate's rulings, and raised no objection regarding jury selection at trial. However, on appeal from his conviction, he contended that it was error to assign the jury selection to the Magistrate. The Court of Appeals affirmed the conviction on the ground that *Gomez* requires reversal only in cases in which the magistrate has acted without the defendant's consent.

Held:

1. The Act's "additional duties" clause permits a magistrate to supervise jury selection in a felony trial provided that the parties consent. The fact that there is only ambiguous evidence of Congress' intent to include jury selection among magistrates' additional duties is far less important here than it was in *Gomez*, for Peretz' consent eliminates the concerns about a constitutional issue and the deprivation of an important right. Absent these concerns, the Act's structure and purpose evince a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection. This reading of the additional duties clause strikes the balance Congress intended between a criminal defendant's interests and the policies undergirding the Act. It allows courts, with the litigants' consent, to continue innovative experiments in the use of magistrates to improve the efficient administration of the courts' dockets, thus relieving the courts of certain subordinate duties that often distract them from more important matters. At the same time, the consent requirement protects a criminal defendant's interest in

requesting the presence of a trial judge at all critical stages of his felony trial. Pp. 932–936.

2. There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent. A defendant has no constitutional right to have an Article III judge preside at jury selection if he has raised no objection to the judge's absence. Cf. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 848. Cf. also, *e. g.*, *United States* v. *Gagnon*, 470 U. S. 522, 528. In addition, none of Article III's structural protections are implicated by this procedure. The entire process takes place under the total control and jurisdiction of the district court, which decides, subject to veto by the parties, whether to invoke a magistrate's assistance and whether to actually empanel the jury selected. See *United States* v. *Raddatz*, 447 U. S. 667. That the Act does not provide for a *de novo* review of magistrates' decisions during jury selection does not alter this result, for, if a defendant requests review, nothing in the statute precludes a court from providing the review required by the Constitution. See *id.*, at 681, n. 7. Pp. 936–939.

904 F. 2d 34, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 940. SCALIA, J., filed a dissenting opinion, *post*, p. 952.

Joel B. Rudin argued the cause for petitioner. With him on the briefs were *Richard W. Levitt* and *Joel Brenner*.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Michael R. Lazerwitz*, and *Joseph Douglas Wilson*.

JUSTICE STEVENS delivered the opinion of the Court.

The Federal Magistrates Act grants district courts authority to assign magistrates certain described functions as well as "such additional duties as are not inconsistent with the Constitution and laws of the United States."[1] In *Gomez* v. *United States*, 490 U. S. 858 (1989), we held that those "additional duties" do not encompass the selection of a jury in a

[1] Pub. L. 90–578, 82 Stat. 1108, as amended, 28 U. S. C. § 636(b)(3).

felony trial without the defendant's consent. In this case, we consider whether the defendant's consent warrants a different result.

I

Petitioner and a codefendant were charged with importing four kilograms of heroin. At a pretrial conference attended by both petitioner and his counsel, the District Judge asked if there was "[a]ny objection to picking the jury before a magistrate?" App. 2. Petitioner's counsel responded: "I would love the opportunity." *Ibid.* Immediately before the jury selection commenced, the Magistrate asked for, and received, assurances from counsel for petitioner and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection.[2] She then proceeded to conduct the *voir dire* and to supervise the selection of the jury. Neither defendant asked the District Court to review any ruling made by the Magistrate.

The District Judge presided at the jury trial, which resulted in the conviction of petitioner and the acquittal of his codefendant. In the District Court, petitioner raised no objection to the fact that the Magistrate had conducted the *voir dire*. On appeal, however, he contended that it was error to assign the jury selection to the Magistrate and that our decision in *Gomez* required reversal. The Court of Appeals disagreed. Relying on its earlier decision in *United States* v. *Musacchia*, 900 F. 2d 493 (CA2 1990), it held "that explicit consent by a defendant to magistrate-supervised *voir dire* waives any subsequent challenge on those grounds," and affirmed petitioner's conviction. App. to Pet. for Cert. 2a; 904 F. 2d 34 (1990) (affirmance order).

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[2] "THE COURT: Mr. Breitbart, I have the consent of your client to proceed with the jury selection?

"MR. BREITBART: Yes, your Honor.

"THE COURT: And Mr. Lopez, do I have the consent of your client to proceed?

"MR. LOPEZ: Yes, your Honor." App. 5.

In *Musacchia*, the Second Circuit had affirmed a conviction in a case in which the defendant had not objected to jury selection by the Magistrate. The Court of Appeals concluded that our holding in *Gomez* applied only to cases in which the magistrate had acted without the defendant's consent. The court explained:

> "Appellants additionally claim that *Gomez* states that a magistrate is without jurisdiction under the Federal Magistrates Act to conduct *voir dire*. We disagree. Since *Gomez* was decided we and other circuits have focused on the 'without defendant's consent' language and generally ruled that where there is either consent or a failure to object a magistrate may conduct the jury *voir dire* in a felony case. *See* [*United States* v. *Vanwort*, 887 F. 2d 375, 382–383 (CA2 1989), cert. denied *sub nom. Chapoteau* v. *United States*, 495 U. S. 906 (1990); *United States* v. *Mang Sun Wong*, 884 F. 2d 1537, 1544 (CA2 1989), cert. denied, 493 U. S. 1082 (1990); *United States* v. *Lopez-Pena*, 912 F. 2d 1542, 1545–1548 (CA1 1989)] (not plain error to permit magistrate to preside since objection to magistrate must be raised or it is waived); *Government of the Virgin Islands* v. *Williams*, 892 F. 2d 305, 310 (3d Cir. 1989) (absent demand no constitutional difficulty under §636(b)(3) with delegating jury selection to magistrate); *United States* v. *Ford*, 824 F. 2d 1430, 1438–39 (5th Cir. 1987) *(en banc)* (harmless error for magistrate to conduct *voir dire* where defendant failed to object), *cert. denied*, 484 U. S. 1034 . . . (1988); *United States* v. *Wey*, 895 F. 2d 429 (7th Cir. 1990) (jury selection by magistrate is not plain error where no prejudice is shown). Concededly, [*United States* v. *France*, 886 F. 2d 223 (CA9 1989),] concluded otherwise. The court there ruled that defendant's failure to contemporaneously object to the magistrate conducting jury selection did not waive her right to appel-

late review. 886 F. 2d at 226. But that holding may be explained, as noted earlier, by what the court perceived as the futility of defendant raising an objection below." 900 F. 2d, at 502.

The conflict among the Circuits described by the Court of Appeals prompted us to grant the Government's petition for certiorari in the *France* case, see *United States* v. *France*, 495 U. S. 903 (1990). Earlier this Term, we affirmed that judgment by an equally divided Court, *United States* v. *France*, 498 U. S. 335 (1991). Thereafter, we granted certiorari in this case and directed the parties to address the following three questions:

"1. Does 28 U. S. C. § 636 permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?

"2. If 28 U. S. C. § 636 permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?

"3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?" See 498 U. S. 1066 (1991).

Resolution of these questions must begin with a review of our decision in *Gomez*.

II

Our holding in *Gomez* was narrow. We framed the question presented as "whether presiding at the selection of a jury in a felony trial *without the defendant's consent* is among those 'additional duties'" that district courts may assign to magistrates. 490 U. S., at 860 (emphasis added). We held that a magistrate "exceeds his jurisdiction" by selecting a jury "despite the defendant's objection." *Id.*, at 876. Thus, our holding was carefully limited to the situation in which the

parties had not acquiesced at trial to the magistrate's role.[3] This particular question had divided the Courts of Appeals. See *id.*, at 861–862, and n. 7. On the other hand, those courts had uniformly rejected challenges to a magistrate's authority to conduct the *voir dire* when no objection to his performance of the duty had been raised in the trial court.[4]

Although we concluded that the role assumed by the Magistrate in *Gomez* was beyond his authority under the Act, we recognized that Congress intended magistrates to play an integral and important role in the federal judicial system. See *id.*, at 864–869 (citing H. R. Rep. No. 96–287, p. 5 (1979)). Our recent decisions have continued to acknowledge the importance Congress placed on the magistrate's role. See, *e. g.*, *McCarthy* v. *Bronson*, 500 U. S. 136, 142 (1991). "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Government of the Virgin Islands* v. *Williams*, 892 F. 2d 305, 308 (CA3 1989).[5]

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[3] As the Third Circuit has recognized:

"The Court did not, however, reach the question presented in this case: whether the Federal Magistrates Act permits a magistrate to preside over the selection of a jury when a defendant consents. In *Gomez*, the Court framed the issue as 'whether presiding at the selection of a jury in a felony trial *without the defendant's consent*' is an additional duty within the meaning of the Federal Magistrates Act. [490 U. S., at 860] (emphasis added); *see also id.* at [876] (rejecting the government's harmless error analysis on the grounds that it 'does not apply in a felony case in which, *despite the defendant's objection* and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury'). *Gomez* thus left open the question whether a defendant's consent makes a difference as to whether a district court may assign voir dire to a magistrate." *Government of the Virgin Islands* v. *Williams*, 892 F. 2d 305, 308–309 (1989).

[4] See, *e. g.*, *United States* v. *Ford*, 824 F. 2d 1430 (CA5 1987) (en banc), cert. denied, 484 U. S. 1034 (1988); *United States* v. *DeFiore*, 720 F. 2d 757 (CA2 1983), cert. denied *sub nom. Coppola* v. *United States*, 466 U. S. 906 (1984); *United States* v. *Rivera-Sola*, 713 F. 2d 866 (CA1 1983); *Haith* v. *United States*, 342 F. 2d 158 (CA3 1965).

[5] "It can hardly be denied that the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who

Cognizant of the importance of magistrates to an efficient federal court system, we were nonetheless propelled towards our holding in *Gomez* by several considerations. Chief among our concerns was this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues." *Gomez*, 490 U. S., at 864. This policy was implicated in *Gomez* because of the substantial question whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial.[6] The principle of constitutional avoidance led

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conceived it. In modern federal practice, federal magistrates account for a staggering volume of judicial work. In 1987, for example, magistrates presided over nearly half a million judicial proceedings. *See* S. Rep. No. 100–293, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U. S. Code Cong. & Admin. News 5564. As a recent State Report noted, '[i]n particular, magistrates [in 1987] conducted over 134,000 preliminary proceedings in felony cases; handled more than 197,000 references of civil and criminal pretrial matters; reviewed more than 6,500 social security appeals and more than 27,000 prisoner filings; and tried more than 95,000 misdemeanors and 4,900 civil cases on consent of the parties. *Id.* at 5565." *Government of the Virgin Islands* v. *Williams*, 892 F. 2d, at 308.

[6] In *Gomez*, we cited our opinion in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986), which emphasized the importance of the personal right to an Article III adjudicator:

"Article III, § 1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government.' *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 583 (1985), and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.' *United States* v. *Will*, 449 U. S. 200, 218 (1980). See also *Thomas*, *supra*, at 582–583; *Northern Pipeline*, 458 U. S., at 58. Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests. See, *e. g.*, *id.*, at 90 (REHNQUIST, J., concurring in judgment) (noting lack of consent to non-Article III jurisdiction); *id.*, at 95 (WHITE, J., dissenting) (same). See also Currie, Bankruptcy Judges and the Independent Judiciary, 16 Creighton L. Rev. 441, 460, n. 108 (1983) (Article III, § 1, 'was designed as a protection for the parties from the risk of legislative or exec-

us to demand clear evidence that Congress actually intended to permit magistrates to take on a role that raised a substantial constitutional question. Cf. *Rust* v. *Sullivan*, 500 U. S. 173, 223 (O'CONNOR, J., dissenting). The requirement that Congress express its intent clearly was also appropriate because the Government was asking us in *Gomez* to construe a general grant of authority to authorize a procedure that deprived an individual of an important privilege, if not a right. See 2A C. Sands, Sutherland on Statutory Construction § 58.04, p. 715 (rev. 4th ed. 1984). The lack of an express provision for *de novo* review, coupled with the absence of any mention in the statute's text or legislative history of a magistrate's conducting *voir dire* without the parties' consent, convinced us that Congress had not clearly authorized the delegation involved in *Gomez*. In view of the constitutional issues involved, and the fact that broad language was being construed to deprive a defendant of a significant right or privilege, we considered the lack of a clear authorization dispositive. See *Gomez*, 490 U. S., at 872, and n. 25, 875–876.

Reinforcing this conclusion was the principle that "[a]ny additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties" that the statute assigned to magistrates.[7] Carefully reviewing the duties that magistrates

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utive pressure on judicial decision'). Cf. *Crowell* v. *Benson*, [285 U. S. 22, 87 (1932)] (Brandeis, J., dissenting)." *Id.*, at 848.

[7] "The Federal Magistrates Act provides that a 'magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.' 28 U. S. C. § 636(b)(3). Read literally and without reference to the context in which they appear, these words might encompass any assignment that is not explicitly prohibited by statute or by the Constitution. . . .

"When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties. Thus in *United States*

were expressly authorized to perform, see *id.*, at 865–871, we focused on the fact that those specified duties that were comparable to jury selection in a felony trial could be performed only with the consent of the litigants.[8] We noted that, in 1968 when magistrates were empowered to try "minor offenses," the exercise of that jurisdiction in any specific case was conditioned upon the defendant's express written consent. See *id.*, at 866. Similarly, the 1976 amendment provided that a magistrate could be designated as a special master in any civil case but only with the consent of the parties. *Id.*, at 867–868. And in 1979, when Congress enlarged the magistrate's criminal jurisdiction to encompass all misdemeanors, the exercise of that authority was subject to the defendant's consent. As we explained:

> "A critical limitation on this expanded jurisdiction is consent. As amended in 1979, the Act states that 'neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.' 93 Stat. 643, 28 U. S. C. § 636(c)(2). In criminal cases, the Government may petition for trial before a district judge. 'Defendants charged with misdemeanors can refuse to consent to a magistrate and thus effect the same removal,' S. Rep. No. 96–74, p. 7 (1979), for the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent." *Id.*, at 870–871 (footnote omitted).

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v. *Raddatz*, 447 U. S. 667, 674–676 (1980); *Mathews* v. *Weber*, 423 U. S. 261 (1976); and *Wingo* v. *Wedding*, 418 U. S. 461 (1974), we interpreted the Federal Magistrates Act in light of its structure and purpose." *Gomez* v. *United States*, 490 U. S., at 863–864.

[8] The legislative history of the statute also emphasizes the crucial nature of the presence or absence of the litigants' consent. See H. R. Rep. No. 96–287, p. 20 (1979) ("Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent").

Because the specified duties that Congress authorized magistrates to perform without the consent of the parties were not comparable in importance to supervision of felony trial *voir dire* but were instead "subsidiary matters," *id.*, at 872, we did not waver from our conclusion that a magistrate cannot conduct *voir dire* over the defendant's objection.

III

This case differs critically from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it. See *supra*, at 925. The considerations that led to our holding in *Gomez* do not lead to the conclusion that a magistrate's "additional duties" may not include supervision of jury selection when the defendant has consented.

Most notably, the defendant's consent significantly changes the constitutional analysis. As we explain in Part IV, *infra*, we have no trouble concluding that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent. The absence of any constitutional difficulty removes one concern that motivated us in *Gomez* to require unambiguous evidence of Congress' intent to include jury selection among a magistrate's additional duties. Petitioner's consent also eliminates our concern that a general authorization should not lightly be read to deprive a defendant of any important privilege.

We therefore attach far less importance in this case to the fact that Congress did not focus on jury selection as a possible additional duty for magistrates. The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to

functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause. Construing this residuary clause absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments that are acceptable to all participants in the trial process and are consistent with the basic purposes of the statute.

Of course, we would still be reluctant, as we were in *Gomez*, to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates. But the litigants' consent makes the crucial difference on this score as well. As we explained in Part II, *supra*, the duties that a magistrate may perform over the parties' objections are generally subsidiary matters not comparable to supervision of jury selection. However, with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial.

We therefore conclude that the Act's "additional duties" clause permits a magistrate to supervise jury selection in a felony trial provided the parties consent. In reaching this result, we are assisted by the reasoning of the Courts of Appeals for the Second, Third, and Seventh Circuits, all of which, following our decision in *Gomez*, have concluded that the rationale of that opinion does not apply when the defendant has not objected to the magistrate's conduct of the *voir dire*. See *United States* v. *Musacchia*, 900 F. 2d 493 (CA2 1990); *United States* v. *Wey*, 895 F. 2d 429 (CA7 1990); *Government of the Virgin Islands* v. *Williams*, 892 F. 2d 305 (CA3 1989).

We share the confidence expressed by the Third Circuit in *Williams* that this reading of the additional duties clause strikes the balance Congress intended between the interests

of the criminal defendant and the policies that undergird the Federal Magistrates Act. *Id.*, at 311. The Act is designed to relieve the district courts of certain subordinate duties that often distract the courts from more important matters.[9] Our reading of the "additional duties" clause will permit the courts, with the litigants' consent, to "continue innovative experimentations" in the use of magistrates to improve the efficient administration of the courts' dockets. See H. R. Rep. No. 94–1609, p. 12 (1976).[10]

At the same time, the requirement that a criminal defendant consent to the additional duty of jury selection protects a defendant's interest in requesting the presence of a judge at all critical stages of his felony trial.

> "If a criminal defendant, together with his attorney, believes that the presence of a judge best serves his interests during the selection of the jury, then *Gomez* preserves his right to object to the use of a magistrate. Where, on the other hand, the defendant is indifferent as to whether a magistrate or a judge should preside, then

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[9] See, *e. g.*, H. R. Rep. No. 94–1609, p. 7 (1976) (magistrate is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"); S. Rep. No. 92–1065, p. 3 (1972) (magistrates "render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases"); H. R. Rep. No. 1629, 90th Cong., 2d Sess., p. 12 (1968) (purpose of Act is "to cull from the ever-growing workload of the U. S. district courts matters that are more desirably performed by a lower tier of judicial officers").

[10] See, *e. g.*, *United States* v. *Peacock*, 761 F. 2d 1313, 1319 (CA9) (Kennedy, J.) ("There may be sound reasons . . . to allow the magistrate to assist [in *voir dire*], as was done in this case. [E]ach of the . . . circuits in the federal system . . . has been instructed to improve its efficiency in juror utilization. . . . The practice of delegating voir dire to a magistrate may assist the district courts in accomplishing this objective"), cert. denied, 474 U. S. 847 (1985).

> it makes little sense to deny the district court the opportunity to delegate that function to a magistrate, particularly if such a delegation sensibly advances the court's interest in the efficient regulation of its docket." *Government of the Virgin Islands* v. *Williams*, 892 F. 2d, at 311.

In sum, the structure and purpose of the Federal Magistrates Act convince us that supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U. S. C. § 636(b)(3) if the litigants consent.[11] The Act evinces a congressional belief that magistrates are well qualified to handle matters of similar importance to jury selection but conditions their authority to accept such responsibilities on the consent of the parties. If a defendant perceives any threat of injury from the absence of an Article III judge in the jury selection process, he need only decline to consent to the magistrate's supervision to ensure that a judge conduct the *voir dire*.[12] However, when a

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[11] We noted in *Gomez* that the legislative history of the Act nowhere listed supervision, without a defendant's consent, of a felony trial *voir dire* as a potential magistrate responsibility. We did call attention, however, to a Committee Report that referred to a "letter suggest[ing] that a magistrate selected juries only *with* consent of the parties." *Gomez* v. *United States*, 490 U. S. 858, 875–876, n. 30 (1989) (emphasis added) (citing H. R. Rep. No. 94–1609, p. 9 (1976)).

[12] We do not qualify the portion of our opinion in *Gomez* that explained why jury selection is an important function, the performance of which may be difficult for a judge to review with infallible accuracy. See 490 U. S., at 873–876. We are confident, however, that defense counsel can sensibly balance these considerations against other concerns in deciding whether to object to a magistrate's supervision of *voir dire*. We stress, in this regard, that defendants may waive the right to judicial performance of other important functions, including the conduct of the trial itself in misdemeanor and civil proceedings. Like jury selection, these duties require the magistrate to "observe witnesses, make credibility determinations, and weigh contradictory evidence," *id.*, at 874, n. 27, and therefore present equivalent problems for judicial oversight.

defendant does consent to the magistrate's role, the magistrate has jurisdiction to perform this additional duty.

IV

There is no constitutional infirmity in the delegation of felony trial jury selection to a magistrate when the litigants consent. As we have already noted, it is arguable that a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at *voir dire*. We need not resolve that question now, however, to determine that a defendant has no constitutional right to have an Article III judge preside at jury selection if the defendant has raised no objection to the judge's absence.

We have previously held that litigants may waive their personal right to have an Article III judge preside over a civil trial. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 848 (1986). The most basic rights of criminal defendants are similarly subject to waiver. See, *e. g.*, *United States* v. *Gagnon*, 470 U. S. 522, 528 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine* v. *United States*, 362 U. S. 610, 619 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola* v. *United States*, 275 U. S. 106, 111 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States* v. *Figueroa*, 818 F. 2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful postarrest delay); *United States* v. *Bascaro*, 742 F. 2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), cert. denied *sub nom. Hobson* v. *United States*, 472 U. S. 1017 (1985); *United States* v. *Coleman*, 707 F. 2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), cert. denied, 464 U. S. 854 (1983). See generally *Yakus* v. *United States*, 321 U. S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in

criminal as well as civil cases by the failure to make timely assertion of the right"). Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.

Even assuming that a litigant may not waive structural protections provided by Article III, see *Schor*, 478 U. S., at 850–851, we are convinced that no such structural protections are implicated by the procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges. See 28 U. S. C. § 631. The "ultimate decision" whether to invoke the magistrate's assistance is made by the district court, subject to veto by the parties. See *United States* v. *Raddatz*, 447 U. S. 667, 683 (1980). The decision whether to empanel the jury whose selection a magistrate has supervised also remains entirely with the district court. Because "the entire process takes place under the district court's total control and jurisdiction," *id.*, at 681, there is no danger that use of the magistrate involves a "congressional attemp[t] 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts, *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 644 (1949) (Vinson, C. J., dissenting) . . . ." *Schor*, 478 U. S., at 850.

In *Raddatz*, we held that the Constitution was not violated by the reference to a Magistrate of a motion to suppress evidence in a felony trial. The principal constitutional argument advanced and rejected in *Raddatz* was that the omission of a requirement that the trial judge must hear the testimony of the witnesses whenever a question of credibility arises violated the Due Process Clause of the Fifth Amendment. Petitioner has not advanced a similar argument in this case, no doubt because it would plainly be foreclosed by our holding in *Raddatz*. That case also disposes of the Article III argument that petitioner does raise. The reasoning

in JUSTICE BLACKMUN's concurring opinion is controlling here:

> "As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise 'recommit the matter to the magistrate with instructions.' See 28 U. S. C. § 636(b)(1). Moreover, the magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(h). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and '[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties.' § 636(b)(4). . . .
>
> "It is also significant that the Magistrates Act imposes significant requirements to ensure competency and impartiality, §§ 631(b), (c), and (i), 632, 637 (1976 ed. and Supp. II), including a rule generally barring reduction of salaries of full-time magistrates, § 634(b). Even assuming that, despite these protections, a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors. Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III. We do not face a procedure under which 'Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact.' *Post*, at 703 (dissenting opinion). Rather, we confront a procedure under which Congress has vested

> in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities." 447 U. S., at 685–686.

Unlike the provision of the Federal Magistrates Act that we upheld in *Raddatz*, § 636(b)(3) contains no express provision for *de novo* review of a magistrate's rulings during the selection of a jury. This omission, however, does not alter the result of the constitutional analysis. The statutory provision we upheld in *Raddatz* provided for *de novo* review only when a party objected to the magistrate's findings or recommendations. See 28 U. S. C. § 636(b)(1). Thus, *Raddatz* established that, to the extent "de novo review is required to satisfy Article III concerns, it need not be exercised unless requested by the parties." *United States* v. *Peacock*, 761 F. 2d 1313, 1318 (CA9) (Kennedy, J.), cert. denied, 474 U. S. 847 (1985). In this case, petitioner did not ask the District Court to review any ruling by the Magistrate. If a defendant in a future case does request review, nothing in the statute precludes a district court from providing the review that the Constitution requires. Although there may be other cases in which *de novo* review by the district court would provide an inadequate substitute for the Article III judge's actual supervision of the *voir dire*, the same is true of a magistrate's determination in a suppression hearing, which often turns on the credibility of witnesses. See *Raddatz*, 447 U. S., at 692 (Stewart, J., dissenting). We presume, as we did in *Raddatz* when we upheld the provision allowing reference to a magistrate of suppression motions, that district judges will handle such cases properly if and when they arise. See *id.*, at 681, n. 7. Our decision that the procedure followed in *Raddatz* comported with Article III therefore requires the same conclusion respecting the procedure followed in this case.

V

Our disposition of the statutory and constitutional questions makes it unnecessary to discuss the third question that we asked the parties to brief and to argue. We note, however, that the Solicitor General conceded that it was error to make the reference to the Magistrate in this case and relied entirely on the argument that the error was waived. Although that concession deprived us of the benefit of an adversary presentation, it of course does not prevent us from adopting the legal analysis of those Courts of Appeals that share our interpretation of the statute as construed in *Gomez*. We agree with the view of the majority of Circuit Judges who have considered this issue, both before and after our decision in *Gomez*, that permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act.[13]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

In *Gomez* v. *United States*, 490 U. S. 858 (1989), this Court held that the Federal Magistrates Act does not authorize magistrates to conduct jury selection at a felony trial. In an

[13] See, *e. g.*, *United States* v. *Alvarado*, 923 F. 2d 253 (CA2 1991); *Government of the Virgin Islands* v. *Williams*, 892 F. 2d 305 (CA3 1989); *United States* v. *Rivera-Sola*, 713 F. 2d 866 (CA1 1983); *United States* v. *Ford*, 824 F. 2d, at 1439–1440 (Jolly, J., concurring). Cf. *United States* v. *Wey*, 895 F. 2d 429, 431 (CA7 1990) ("it may be that the defendant's consent could authorize the judge to designate a magistrate, under 28 U. S. C. § 636(b)(3), to preside over jury selection"); *Ford*, 824 F. 2d, at 1438–1439 (failure to object constitutes waiver of error); *United States* v. *DeFiore*, 720 F. 2d 757 (CA2 1983), cert. denied *sub nom. Coppola* v. *United States*, 466 U. S. 906 (1984). But see *United States* v. *Martinez-Torres*, 912 F. 2d 1552 (CA1 1990) (en banc); *United States* v. *France*, 886 F. 2d 223 (CA9 1989).

amazing display of interpretive gymnastics, the majority twists, bends, and contorts the logic of *Gomez*, attempting to demonstrate that the consideration critical to our holding in that case was the defendant's refusal to consent to magistrate jury selection. I find *Gomez* to be considerably less flexible. Our reasoning in *Gomez* makes clear that the absence or presence of consent is entirely irrelevant to the Federal Magistrates Act's prohibition upon magistrate jury selection in a felony trial.

The majority's reconstruction of *Gomez* is not only unsound, but also unwise. By discarding *Gomez*'s categorical prohibition of magistrate felony jury selection, the majority unnecessarily raises the troubling question whether this practice is consistent with Article III of the Constitution. To compound its error, the majority resolves the constitutional question in a manner entirely inconsistent with our controlling precedents. I dissent.

I

A

The majority purports to locate the source of a magistrate's authority to conduct consented-to felony jury selection in the Act's "additional duties" clause, which states that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U. S. C. §636(b)(3). Whether the additional duties clause authorizes a magistrate to conduct jury selection in a felony trial is a conventional issue of statutory interpretation. In *Gomez*, we held that "[t]he absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function." 490 U. S., at 875–876 (footnote omitted). In my view, the existence of a defendant's consent has absolutely no effect on that conclusion.

In *Gomez*, we rejected a literal reading of the additional duties clause that would have authorized magistrates to exercise *any* power not expressly prohibited by federal statute or the Constitution. See *id.*, at 864–865. Relying on precedent and legislative history, we emphasized that the additional duties clause is to be read according to Congress' intention that magistrates "handle subsidiary matters[,] [thereby] enabl[ing] district judges to concentrate on trying cases." *Id.*, at 872.

> "If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, *there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties*, and a consequent benefit to both efficiency and the quality of justice in the Federal courts." H. R. Rep. No. 94–1609, p. 12 (1976) (emphasis added) (1976 amendments to Federal Magistrates Act); accord, S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967) (Federal Magistrates Act of 1968).[1]

We identified two reasons in *Gomez* for inferring that Congress intended jury selection in felony trials to be one of the "vital and traditional adjudicatory duties" retained by district

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[1] This theme pervades the Act's legislative history. See, *e. g.*, S. Rep. No. 96–74, p. 3 (1979) (1979 amendments to Federal Magistrates Act) ("In enacting the Federal Magistrates Act in 1968, the Congress clearly intended that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the judge could have more time to preside at the trial of cases"); H. R. Rep. No. 94–1609, p. 6 (1976) (same); S. Rep. 94–625, p. 6 (1976) (1976 amendments to Federal Magistrates Act) ("Without the assistance furnished by magistrates . . . the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself"); see also S. Rep. No. 371, 90th Cong., 1st Sess., 9 (1967) (Federal Magistrates Act is intended "to cull from the ever-growing workload of the U. S. district courts matters that are more desirably performed by a lower tier of judicial officers").

judges rather than delegated to magistrates. First, we noted that Congress felt it necessary to define expressly a magistrate's limited authority to conduct misdemeanor and civil trials. See 28 U. S. C. §§ 636(a)(3), 636(c). We concluded that "th[is] carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases" constituted "an implicit withholding of the authority to preside at a felony trial." *Gomez*, 490 U. S., at 872. And in light of the traditional judicial and legislative understanding that jury selection is an essential component of a felony trial,[2] we determined that Congress' intention to deny magistrates the authority to preside at felony trials also extends to jury selection. See *id.*, at 871–872.

In my view, this structural inference is not at all affected by a defendant's consent. Under the Act, consent of the parties is a necessary condition of a magistrate's statutory authority to preside at a civil or misdemeanor trial. See 18 U. S. C. § 3401(b); 28 U. S. C. § 636(c)(1). To hold, as the majority does, that a magistrate may likewise conduct jury selection in a felony trial so long as the defendant consents is to treat the magistrate's authority in this part of the felony trial as perfectly coextensive with his authority in civil and misdemeanor trials—the reading of the Act that *Gomez* categorically rejected.

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[2] As we have observed, "'"[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins."'" *Gomez* v. *United States*, 490 U. S. 858, 873 (1989), quoting *Lewis* v. *United States*, 146 U. S. 370, 374 (1892), quoting *Hopt* v. *Utah*, 110 U. S. 574, 578 (1884). Moreover, "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez*, *supra*, at 873 (citations omitted). We discerned Congress' recognition of this understanding from its passage of the Speedy Trial Act, 18 U. S. C. § 3161, and from its placement of rules relating to juries and jury selection in a chapter of the Federal Rules of Criminal Procedure entitled "Trial." See *Gomez*, *supra*, at 873, citing Fed. Rules Crim. Proc. 23 and 24.

The second basis for our conclusion in *Gomez* that Congress intended felony jury selection to be nondelegable was Congress' failure expressly to provide for judicial review of magistrate jury selection in felony cases. The Federal Magistrates Act provides two separate standards of judicial review: "clearly erroneous or contrary to law" for magistrate resolution of nondispositive matters, see 28 U. S. C. § 636(b)(1)(A), and "*de novo*" for magistrate resolution of dispositive matters, see § 636(b)(1)(B)–(C). We deemed Congress' failure to identify *any* standard of judicial review for jury selection in felony trials to be persuasive evidence of Congress' intent that magistrates not perform this function. *Gomez*, *supra*, at 873–874.

Again, I fail to see how a defendant's consent to a magistrate's exercise of such authority can alter this inference. Congress said no more about the standard of review for consented-to magistrate jury selection than it did about the standard for unconsented-to magistrate jury selection. Nor does the majority identify anything in the statute to indicate the appropriate standard for consented-to magistrate jury selection.

The majority opines that "nothing in the statute precludes" judicial review, *ante*, at 939. However, it fails to explain how such review may be achieved. The majority's silence is regrettable. In *Gomez*, we recognized that jury selection is most similar to the functions identified as "dispositive matters," for which the Act prescribes a *de novo* review standard. 490 U. S., at 873. We expressed "serious doubts," however, as to whether any review could be meaningfully conducted. *Id.*, at 874.[3] We likewise concluded that re-

[3] "To detect prejudices, the examiner—often, in the federal system, the court—must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. But only words can be preserved for review; no tran-

examination of individual jurors by the district judge would not be feasible because "as a practical matter a second interrogation might place jurors on the defensive, engendering prejudices irrelevant to the facts adduced at trial." *Id.*, at 875, n. 29. These difficulties in providing effective review of magistrate jury selection were central to our construction of the Act in *Gomez*, yet they are essentially ignored today.[4]

In *Gomez*, we found confirmation of the inferences that we drew from the statutory text in "[t]he absence of a specific reference to jury selection in . . . the legislative history." *Id.*, at 875. See *ante*, at 930. The legislative history of the Act offers no more support for consented-to magistrate felony jury selection.[5]

In response to the paucity of support for its construction, the majority notes that in *Gomez* we "call[ed] attention" to a House Committee Report that "referred" to a letter from a district judge mentioning jury selection as a duty assigned to

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script can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." *Gomez*, *supra*, at 874–875 (citations omitted).

[4] The majority concedes that magistrate jury selection "may be difficult for a judge to review with infallible accuracy." *Ante*, at 935, n. 12. But it dismisses any concerns with respect to the difficulty of effective judicial review, stating that the defendant can eliminate the need for judicial review altogether by simply declining to consent to magistrate jury selection. *Ante*, at 935, and n. 12. This rationalization misses the point. Insofar as the Federal Magistrates Act insists that magistrate functions be subject to judicial review, the impossibility of effective review is reason *not* to construe the additional duties clause as authorizing magistrates to conduct felony jury selection, regardless of whether the parties consent. See *Gomez*, *supra*, at 874–875.

[5] In *Gomez*, we noted that Committee Reports accompanying the 1976 and 1979 amendments to the Magistrates Act contained charts cataloging magistrate functions. In determining Congress' understanding of the permissible scope of magistrate duties, we found it relevant that not one of the charts mentioned jury selection. See *Gomez*, 490 U. S., at 875, n. 30 (citing H. R. Rep. No. 96–287, pp. 4–5 (1979); S. Rep. No. 96–74, at 3; H. R. Rep. No. 94–1609, at 7; S. Rep. No. 94–625, at 5). Needless to say, the charts also contain no mention of jury selection where the parties have consented to magistrate supervision.

magistrates. *Ante*, at 935, n. 11. While the majority observes that the letter "'suggest[ed] that a magistrate selected juries only *with* consent of the parties,'" *ibid.*, quoting *Gomez*, 490 U. S., at 875, n. 30 (emphasis added by majority), it neglects to record other salient facts that we noted about this letter. In particular, the letter was the "*lone reference*" in the entire legislative history to such authority. *Ibid.* (emphasis added). Moreover, the letter suggested that magistrate jury selection took place "*perhaps only in civil trials.*" *Id.*, at 876, n. 30 (emphasis added). Finally, as we pointed out in *Gomez*,

> "[the letter] displays little concern about the validity of such assignments: 'How can we do all of this? We just do it. It's not necessary that we find authority in black and white before we give something to the magistrate. . . . Sure we might get shot down once in a while by an appellate court. So what?'" *Ibid.* (citation omitted).

B

It is clear that the considerations that motivated our holding in *Gomez* compel the conclusion that the Federal Magistrates Act does not permit magistrate felony jury selection even when the defendant consents. I find the majority's arguments to the contrary wholly unpersuasive.

According to the majority, "[t]his case differs critically from *Gomez*" because petitioner's counsel consented to the delegation of jury selection to the Magistrate. *Ante*, at 932. Although it asserts that this factor was essential to our analysis, the majority fails to explain how consent has any bearing on the statutory power of a magistrate to conduct felony jury selection. As I have already indicated, the reasoning behind our conclusion in *Gomez* that Congress did not endow magistrates with jurisdiction to preside over felony jury selection had nothing to do with the defendant's refusal to consent to such jurisdiction.

Unable to support its revisionist construction of the Act with what we said in *Gomez*, the majority seeks to bolster its construction by noting that, provided the parties consent, magistrates may conduct civil and misdemeanor trials and that "[t]hese duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Ante*, at 933. The majority's analogy misses the point. The fact that Congress imposed the condition of consent on magistrates' exercise of expressly-provided authority does not prove that Congress also authorized magistrates to conduct trial duties not expressly enumerated in the Federal Magistrates Act—such as supervision of felony jury selection. At most, these specifically enumerated grants of trial authority suggest that *if* Congress had intended to confer on magistrates authority to conduct felony jury selection, it *would have* predicated that authority on the parties' consent. However, as I have already discussed, see *supra*, at 942–943, construing the Act as authorizing magistrates to conduct consented-to jury selection in felony cases merely because the Act authorizes consented-to jurisdiction in civil and misdemeanor cases is to draw an inference from Congress' silence precisely opposite to the inference we drew in *Gomez*.[6]

[6] Even if I were to accept the majority's conclusion that the scope of a magistrate's authority under the additional duties clause turns on litigant consent, I still could not accept the majority's assumption that there was effective consent in this case. Because the additional duties clause contains no language predicating delegation of an additional duty upon litigant consent, it likewise contains nothing indicating what constitutes "consent" to the delegation of an additional duty. I would think, however, that the standard governing a party's consent to delegation of a portion of a felony trial under the additional duties clause should be at least as strict as that governing delegation of a misdemeanor trial to a magistrate. Under the Act, before a magistrate can conduct a misdemeanor trial, the magistrate must explain to the defendant that he has a right to a trial before a district court judge. If the defendant elects to proceed before the magistrate, the *defendant* must consent *in writing*. See 18 U. S. C. § 3401(b); see also 28 U. S. C. § 636(a)(3) (incorporating requirements of 18 U. S. C. § 3401 into the Federal Magistrates Act). The procedural safeguard of written con-

Finally, the majority defends its construction of the additional duties clause by stating that it will permit "'continue[d] innovative experimentations' in the use of magistrates to improve the efficient administration" of the district courts. *Ante*, at 934. Taken literally, such a rationale admits of no limits, and for this reason it cannot function as a legitimate basis for construing the scope of a magistrate's permissible "additional duties." As in *Gomez*, we must give content to the additional duties clause by looking to Congress' intention that magistrates be delegated administrative and other quasi-judicial tasks in order to free Article III judges to conduct trials, most particularly *felony* trials. See *supra*, at 942. By creating authority for magistrates to preside over a "critical stage" of the felony trial, see *Gomez*, *supra*, at 873, merely because a defendant fails to request a judge, the majority completely misapprehends both Congress' conception of the appropriate role to be played by magistrates and our analysis in *Gomez*.

II

I have outlined why I believe the only defensible construction of the Federal Magistrates Act is that jury selection in a felony trial can never be one of a magistrate's "additional duties"—regardless of whether a defendant consents. But even if I believed that mine was only one of two "reasonable" interpretations, I would still reject the majority's construction of the Act, because it needlessly raises a serious constitutional question: whether jury selection by a magistrate—

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sent by the defendant "'show[s] a statutory intent to preserve trial before the district judge as the principal—rather than an elective or alternative—mode of proceeding in minor offense cases.'" *Gomez*, *supra*, at 872, n. 24, (quoting 114 Cong. Rec. 27342 (1968) (remarks of Rep. Poff)). In this case, the defendant did not consent in writing; in fact, the *defendant* did not proffer consent in any form. Instead, what the majority accepts as sufficient consent were merely verbal remarks made by defense counsel at a pretrial conference and jury selection. See App. 2, 5.

even when a defendant consents—is consistent with Article III.

It is well established that we should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez*, 490 U. S., at 864; accord, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 841 (1986); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). Given the inherent complexity of Article III questions, the canon of constitutional avoidance should apply with particular force when an Article III issue is at stake. Cf. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 90 (1982) (REHNQUIST, J., concurring in judgment) ("Particularly in an area of constitutional law such as that of 'Art. III Courts,' with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy").

Although this principle guided our analysis in *Gomez*, see 490 U. S., at 864, it is all but forgotten today. The majority simply dismisses altogether the seriousness of the underlying constitutional question: "[W]e have no trouble concluding that there is no Article III problem when a district court judge permits a magistrate to conduct *voir dire* in accordance with the defendant's consent." *Ante*, at 932. The majority's self-confidence is unfounded. It is only by unacceptably manipulating our Article III teachings that the majority succeeds in avoiding the difficulty that attends its construction of the Act.

As the Court explained in *Schor*, Article III's protections have two distinct dimensions. First, Article III "safeguard[s] litigants' 'right to have claims decided before judges who are free from potential domination by other branches of

government.'" *Schor*, *supra*, at 848, quoting *United States* v. *Will*, 449 U. S. 200, 218 (1980). Second, Article III "serves as 'an inseparable element of the constitutional system of checks and balances'" by preserving "the role of the Judicial Branch in our tripartite system" of government. *Schor*, *supra*, at 850, quoting *Northern Pipeline*, *supra*, at 58. Although parties may waive their personal guarantee of an independent Article III adjudicator, *Schor*, *supra*, at 848, parties may *not* waive Article III's structural guarantee.

> "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts . . . . To the extent that this structural principle is implicated in a given case, *the parties cannot by consent cure the constitutional difficulty* for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." 478 U. S., at 850–851 (emphasis added; citations omitted).

In *Gomez*, we recognized and attempted to accommodate "abiding concerns regarding the constitutionality of delegating felony trial duties to magistrates." See 490 U. S., at 863. Because jury selection is "a critical stage" of the felony trial, see *id.*, at 873, there is a serious question, as several Courts of Appeals have noted, whether allowing a magistrate to conduct felony jury selection "impermissibly intrude[s] on the province of the judiciary," *Schor*, *supra*, at 851–852. See *United States* v. *Trice*, 864 F. 2d 1421, 1426 (CA8 1988), cert. dism'd, 491 U. S. 914 (1989); *United States* v. *Ford*, 824 F. 2d 1430, 1434–1435 (CA5 1987) (en banc), cert. denied, 484 U. S. 1034 (1988).

Indeed, this problem admits of no easy solution. This Court's decision in *United States* v. *Raddatz*, 447 U. S. 667 (1980), suggests that delegation of Article III powers to a magistrate is permissible only if the ultimate determinations on the merits of delegated matters are made by the district judge. See *id.*, at 683 ("[A]lthough the [Federal Magistrates Act] permits the district court to give to the magistrate's proposed findings of fact and recommendations 'such weight as [their] merit commands and the sound discretion of the judge warrants,' that delegation does not violate Art. III *so long as the ultimate decision is made by the district court*" (emphasis added; citation omitted)).[7] In *Schor*, we likewise emphasized the availability of *de novo* judicial review in upholding the performance of core Article III powers by an Article I tribunal. See 478 U. S., at 853. But this means of satisfying the Constitution is not available here. For, as I have noted, *supra*, at 944, the Federal Magistrates Act does not expressly provide for judicial review of felony jury selection, and in *Gomez* we expressed "serious doubts" whether such review was even possible. See 490 U. S., at 874.

The majority contends that magistrate jury selection raises no Article III structural difficulties, because "'the entire process takes place under the district court's total control and jurisdiction.'" *Ante*, at 937, quoting *Raddatz*, *supra*, at 681. However, as *Raddatz* and *Schor* underscore, the requirement of "the district court's total control and jurisdiction" must include the availability of meaningful judicial review of the magistrate's actual rulings at jury selection. The majority's observation that "nothing in the statute precludes a dis-

[7] The majority seeks to evade this difficulty by pronouncing that JUSTICE BLACKMUN's concurring opinion in *Raddatz* now "control[s]" the constitutional analysis of a delegation of Article III duties to a magistrate. *Ante*, at 938. JUSTICE BLACKMUN's opinion in *Raddatz*, however, offers little repose for the majority, for JUSTICE BLACKMUN likewise identifies the availability of judicial review as a necessary predicate of the constitutionality of any delegation of Article III duties to a magistrate. See *United States* v. *Raddatz*, 447 U. S., at 685 (BLACKMUN, J., concurring).

trict court from providing the review that the Constitution requires," *ante*, at 939, is equally unavailing. The critical question for Article III purposes is whether meaningful judicial review of magistrate felony jury selection can be accomplished. The majority does not answer this question, and *Gomez* strongly suggests that it cannot.

Because it ignores the teachings of *Raddatz* and *Schor*, the majority's analysis of the Article III difficulty posed by its construction of the Federal Magistrates Act raises the question whether these decisions remain good law. This consequence is particularly unfortunate, because, as I have set forth above, the most coherent reading of the Federal Magistrates Act avoids these problems entirely.

I dissent.

JUSTICE SCALIA, dissenting.

When, at a pretrial conference, the United States District Judge assigned to this case asked petitioner's counsel (in petitioner's presence) whether he had "[a]ny objection to picking the jury before a magistrate," counsel responded, "I would love the opportunity." App. 2. Before conducting *voir dire*, the Magistrate herself asked counsel, "I have the consent of your client to proceed with the jury selection?" Counsel answered, "Yes, your Honor." *Id.*, at 5. After the jury was selected under the Magistrate's supervision, but before it was sworn, the parties met with the District Judge to discuss unresolved pretrial matters. Neither petitioner nor his counsel raised any objection at that time—or at any other point during the trial—to the Magistrate's role in jury selection. Two significant events transpired thereafter. First, the jury convicted petitioner on all counts. Second, after the conviction but prior to sentencing, this Court announced *Gomez* v. *United States*, 490 U. S. 858 (1989), holding that the Federal Magistrates Act did not authorize magistrates to conduct felony *voir dire* (in that case, where a defendant had objected). On appeal, petitioner sought to raise a *Gomez* claim, but the Court of Appeals held that his consent below

precluded him from raising this newly discovered objection to the Magistrate's role.

As a general matter, of course, a litigant must raise all issues and objections at trial. See *Freytag* v. *Commissioner*, *ante*, at 894–895 (SCALIA, J., concurring in judgment). For criminal proceedings in the federal courts, this principle is embodied in Federal Rule of Criminal Procedure 51, which requires "a party, at the time the ruling or order of the [trial] court is made or sought, [to] mak[e] known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor."

Rule 51's command is not, however, absolute. One of the hoariest precepts in our federal judicial system is that a claim going to a court's subject-matter jurisdiction may be raised at any point in the litigation by any party. See *Freytag*, *ante*, at 896 (SCALIA, J., concurring in judgment). Petitioner seeks to invoke that exception here, relying on our statement in *Gomez* that the Magistrate lacked "jurisdiction to preside" over the *voir dire* in that case, 490 U. S., at 876. But, as Judge Easterbrook has aptly observed, "'jurisdiction' . . . is a many-hued term." *United States* v. *Wey*, 895 F. 2d 429, 431 (CA7), cert. denied, 497 U. S. 1029 (1990). We used it in *Gomez* as a synonym for "authority," not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act.

This venerable exception to the contemporaneous-objection rule being inapplicable here, petitioner plainly forfeited the *right* to advance his current challenges to the Magistrate's role. In certain narrow contexts, however, appellate courts have *discretion* to overlook a trial forfeiture. The most im-

portant of these is described in Federal Rule of Criminal Procedure 52(b): In criminal cases, an appellate court may notice "errors or defects" not brought to the attention of the trial court if they are "plain" and "affec[t] substantial rights." See *United States* v. *Young*, 470 U. S. 1, 15, and n. 12 (1985). Petitioner's contention that this case falls into that exception comes up against our admonition that Rule 52(b) applies only to errors that are obvious as well as significantly prejudicial. See, *e. g.*, *United States* v. *Frady*, 456 U. S. 152, 163, and nn. 13, 14 (1982). The error alleged here was anything but obvious. At the time this case was tried, the Second Circuit had held that a magistrate was authorized to conduct felony *voir dire* even if the defendant objected, see *United States* v. *Garcia*, 848 F. 2d 1324 (1988), rev'd *sub nom. Gomez* v. *United States*, 490 U. S. 858 (1989). No Circuit had held that it was error for a magistrate to conduct *voir dire* where the defendant consented. Perhaps the best indication that there was no "plain" error, of course, is that five Justices of this Court today hold that there was no error at all.*

Even when an error is not "plain," this Court has in extraordinary circumstances exercised discretion to consider claims forfeited below. See, *e. g.*, *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 535–536 (1962) (opinion of Harlan, J.); *Grosso* v. *United States*, 390 U. S. 62, 71–72 (1968); *Hormel* v. *Helvering*, 312 U. S. 552, 556–560 (1941). In my view, that course is appropriate here. Petitioner's principal claims are that the Federal Magistrates Act does not allow a district court to assign felony *voir dire* to a magistrate even with the defendant's consent, and that in any event the consent here was ineffective because given orally by counsel and not in writing by the defendant. By definition, these claims can be

*Because I conclude that the alleged error was not "plain," I have no occasion to assess its prejudicial impact, assuming that that is possible. Cf. *Gomez* v. *United States*, 490 U. S., at 876; *Arizona* v. *Fulminante*, 499 U. S. 279, 296 (1991).

advanced *only* by a litigant who will, if ordinary rules are applied, be deemed to have forfeited them: A defendant who objects will not be assigned to the magistrate at all. Thus, if we invariably dismissed claims of this nature on the ground of forfeiture, district courts would *never* know whether the Act authorizes them, with the defendant's consent, to refer felony *voir dire* to a magistrate, and, if so, what form the consent must take. Cf. 18 U. S. C. §3401(b) (defendant's consent to magistrate in misdemeanor trial must be in writing).

Given the impediments to the proper assertion of these claims, I believe we are justified in reaching the statutory issue today to guide the district courts in the future performance of their duties. It is not that we *must* address the claims because all legal questions require judicial answers, cf. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 489 (1982); *Webster* v. *Doe*, 486 U. S. 592, 612–613 (1988) (SCALIA, J., dissenting), but simply that the relevant rules and statutes governing forfeiture, as we have long construed them, recognize a limited discretion which it is eminently sensible to exercise here.

Turning to the merits of the statutory claim, I am in general agreement with JUSTICE MARSHALL. In my view, *Gomez* was driven not primarily by the constitutional problems associated with forcing a litigant to adjudicate his federal claim before a magistrate, but by ordinary principles of statutory interpretation. By specifically authorizing magistrates to perform duties in civil and misdemeanor trials, and specifying the manner in which parties were to express their consent in those situations, the statute suggested *absence* of authority to preside over felony trials through some (unspecified) mode of consent. The canon of *ejusdem generis* keeps the "additional duties" clause from swallowing up the rest of the statute. See *Gomez*, *supra*, at 872.

I would therefore conclude (as respondent in fact conceded) that district courts are not authorized by the Federal Magis-

trates Act to delegate felony *voir dire* to magistrates. Having reached that conclusion, I need not, and do not, answer the serious and difficult constitutional questions raised by the contrary construction. I note, however, that while there may be persuasive reasons why the use of a magistrate in these circumstances is constitutional, the Court does not provide them today. The Court's analysis turns on the fact that courts *themselves* control the decision whether, and to what extent, magistrates will be used. *Ante*, at 937–939. But the Constitution guarantees not merely that no branch will be forced by one of the *other* branches to let someone else exercise its assigned powers—but that none of the branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation of legislative power (which delegation cannot plausibly be compelled by one of the other branches) is a dead letter, and our decisions in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), are inexplicable.

Syllabus

HARMELIN *v.* MICHIGAN

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 89-7272. Argued November 5, 1990—Decided June 27, 1991

Petitioner Harmelin was convicted under Michigan law of possessing more than 650 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. The State Court of Appeals affirmed, rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. He claims here that the sentence is cruel and unusual because it is "significantly disproportionate" to the crime he committed, and because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal.

Held: The judgment is affirmed.

176 Mich. App. 524, 440 N. W. 2d 75, affirmed.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part IV, concluding that Harmelin's claim that his sentence is unconstitutional because it is mandatory in nature, allowing the sentencer no opportunity to consider "mitigating factors," has no support in the Eighth Amendment's text and history. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout the Nation's history. Although Harmelin's claim finds some support in the so-called "individualized capital-sentencing doctrine" of this Court's death penalty jurisprudence, see, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, that doctrine may not be extended outside the capital context because of the qualitative differences between death and all other penalties, see, *e. g.*, *id.*, at 303-305. Pp. 994-996.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, concluded in Parts I, II, and III that because the Eighth Amendment contains no proportionality guarantee, Harmelin's sentence cannot be considered unconstitutionally disproportional. Pp. 962-994.

(a) For crimes concededly classified and classifiable as felonies—*i. e.*, as punishable by significant terms of imprisonment in a state penitentiary—the length of the sentence actually imposed is purely a matter of legislative prerogative. *Rummel* v. *Estelle*, 445 U. S. 263, 274. *Solem* v. *Helm*, 463 U. S. 277, which decreed a "general principle of proportionality," *id.*, at 288, and used as the criterion for its application a three-factor test that had been explicitly rejected in *Rummel*, *supra*, at

281–282, and n. 27, and *Hutto* v. *Davis*, 454 U. S. 370, 373–374, was wrong and should be overruled. Pp. 962–965.

(b) Although *Solem*, *supra*, at 285, correctly discerned that the Eighth Amendment prohibition was derived from the "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689, *Solem*'s conclusion that the latter provision embodied a right to be free from disproportionate punishments is refuted by the circumstances of the declaration's enactment and the contemporaneous understanding of the English guarantee. The guarantee was directed at the arbitrary use of the sentencing power by the King's Bench in particular cases and at the illegality, rather than the disproportionality, of punishments thereby imposed. Pp. 966–975.

(c) That the Americans who adopted the Eighth Amendment intended its Cruel and Unusual Punishments Clause as a check on the ability of the Legislature to authorize particular *modes* of punishment—*i. e.*, cruel methods of punishment that are not regularly or customarily employed—rather than as a guarantee against disproportionate sentences is demonstrated by the available evidence of contemporary understanding, including the context of adoption, the debates of the state ratifying conventions and the First Congress, and early commentary and judicial decisions. It is particularly telling that those who framed and approved the Federal Constitution chose not to include within it the explicit guarantee against disproportionate sentences that some State Constitutions contained. Pp. 975–985.

(d) There are no adequate textual or historical standards to enable judges to determine whether a particular penalty is disproportional. The first two of the factors that *Solem* found relevant—the inherent gravity of the defendant's offense and the sentences imposed for similarly grave offenses in some jurisdictions—fail for lack of an objective standard of gravity. Since, as the statutes Americans have enacted in different times and places demonstrate, there is enormous variation of opinion as to what offenses are serious, the proportionality principle is an invitation for judges to impose their own subjective values. Moreover, although the third *Solem* factor—the character of the sentences imposed by other States for the same crime—can be applied with clarity and ease, it is irrelevant to the Eighth Amendment. Traditional notions of federalism entitle States to treat like situations differently in light of local needs, concerns, and social conditions. Pp. 985–990.

(e) Although this Court's 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no Eighth Amendment proportionality requirement, it has not departed to the extent that *Solem* suggests. While *Weems* v. *United States*, 217 U. S. 349—which was cited by *Solem*, *supra*, at 287, as the "leading case"—did contain language suggesting that mere disproportionality might make a

punishment cruel and unusual, 217 U. S., at 366–367, it also contained statements indicating that the unique punishment there at issue was unconstitutional because it was unknown to Anglo-American tradition, *id.*, at 377. It is hard to view *Weems* as announcing a constitutional proportionality requirement, given that it did not produce a decision implementing such a requirement, either in this Court or the lower federal courts, for six decades. This Court's first such opinion, *Coker* v. *Georgia*, 433 U. S. 584, 592, was a death penalty case. The *Coker* line of authority should not be treated as a generalized aspect of Eighth Amendment law, since proportionality review is one of several respects in which "death is different," requiring protections that the Constitution nowhere else provides. Pp. 990–994.

JUSTICE KENNEDY, joined by JUSTICE O'CONNOR and JUSTICE SOUTER, concluded:

1. This Court's decisions recognize that the Eighth Amendment's Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle that applies to noncapital sentences. See, *e. g.*, *Weems* v. *United States*, 217 U. S. 349, 371; *Rummel* v. *Estelle*, 445 U. S. 263, 271–274, and n. 11; *Hutto* v. *Davis*, 454 U. S. 370, 374, and n. 3; *Solem* v. *Helm*, 463 U. S. 277. Although these decisions have not been totally clear or consistent, close analysis yields some common principles that give content to the uses and limits of proportionality review. First, the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations. Second, there are a variety of legitimate penological schemes based on theories of retribution, deterrence, incapacitation, and rehabilitation, and the Eighth Amendment does not mandate adoption of any one such scheme. Third, marked divergences both in sentencing theories and the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure, and differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of terms for particular crimes. Fourth, proportionality review by federal courts should be informed by objective factors to the maximum extent possible, and the relative lack of objective standards concerning length, as opposed to type, of sentence has resulted in few successful proportionality challenges outside the capital punishment context. Finally, the Eighth Amendment does not require strict proportionality between crime and sentence, but rather forbids only extreme sentences that are grossly disproportionate to the crime. Pp. 996–1001.

2. In light of the foregoing principles, Harmelin's sentence does not violate the Cruel and Unusual Punishments Clause. Although a sen-

tence of life imprisonment without parole is the second most severe penalty permitted by law, it is not grossly disproportionate to Harmelin's crime of possessing more than 650 grams of cocaine. His suggestion that the crime was nonviolent and victimless is false to the point of absurdity. Studies demonstrate the grave threat that illegal drugs, and particularly cocaine, pose to society in terms of violence, crime, and social displacement. The amount of cocaine Harmelin possessed has a potential yield of between 32,500 and 65,000 doses, and the Michigan Legislature could with reason conclude that possession of this large an amount is momentous enough to warrant the deterrence and retribution of a life sentence without parole. Given the severity of Harmelin's crime, there is no need to conduct a comparative analysis between his sentence and sentences imposed for other crimes in Michigan and for the same crime in other jurisdictions. This Court's decisions indicate that such an analysis is appropriate in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality, see *Solem*, *supra*, at 293–300; *Weems*, *supra*, at 377–381, but not in the usual case where no such inference arises, see, *e. g.*, *Rummel*, *supra*, at 281. Pp. 1001–1005.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and an opinion with respect to Parts I, II, and III, in which REHNQUIST, C. J., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR and SOUTER, JJ., joined, *post*, p. 996. WHITE, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 1009. MARSHALL, J., filed a dissenting opinion, *post*, p. 1027. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 1028.

Carla J. Johnson, by appointment of the Court, 497 U. S. 1022, argued the cause and filed a brief for petitioner.

Richard Thompson argued the cause for respondent. With him on the brief was *Michael J. Modelski.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro;* and for Criminal Defense Attorneys of Michigan et al. by *Neil H. Fink*, *Elizabeth L. Jacobs*, and *William Swor*.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Starr*, *Acting Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *James A. Feldman;* for the State of

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Part IV, and an opinion with respect to Parts I, II, and III, in which THE CHIEF JUSTICE joins.

Petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole.[1] The Michigan Court of Appeals initially reversed his conviction because evidence supporting it had been obtained in violation of the Michigan Constitution. 176 Mich. App. 524, 440 N. W. 2d 75 (1989). On petition for rehearing, the Court of Appeals vacated its prior decision and affirmed petitioner's sentence, rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. *Id.*, at 535, 440 N. W. 2d, at 80. The Michigan Supreme Court denied leave to appeal, 434 Mich. 863 (1990), and we granted certiorari. 495 U. S. 956 (1990).

Petitioner claims that his sentence is unconstitutionally "cruel and unusual" for two reasons: first, because it is "significantly disproportionate" to the crime he committed; second, because the sentencing judge was statutorily required to

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Arizona by *Robert K. Corbin*, Attorney General, *Jessica Gifford Funkhouser*, and *Vicki Gotkin Adler*, Assistant Attorney General; for the State of Michigan by *Frank J. Kelley*, Attorney General, *Gay Secor Hardy*, Solicitor General, and *K. Davison Hunter* and *Thomas C. Nelson*, Assistant Attorneys General; for the National District Attorneys Association by *Richard P. Ieyoub*, *Jack E. Yelverton*, and *James P. Manak*; for the Prosecuting Attorneys Association of Michigan by *Robert Weiss*, *John D. O'Hair*, and *Timothy A. Baughman*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar*.

[1] Michigan Comp. Laws Ann. § 333.7403(2)(a)(i) (West Supp. 1990–1991) provides a mandatory sentence of life in prison for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance"; § 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. Section 791.234(4) provides eligibility for parole after 10 years in prison, except for those convicted of either first-degree murder or "a major controlled substance offense"; § 791.233b[1](b) defines "major controlled substance offense" as, *inter alia*, a violation of § 333.7403.

impose it, without taking into account the particularized circumstances of the crime and of the criminal.

I

A

The Eighth Amendment, which applies against the States by virtue of the Fourteenth Amendment, see *Robinson* v. *California*, 370 U. S. 660 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Rummel* v. *Estelle*, 445 U. S. 263 (1980), we held that it did not constitute "cruel and unusual punishment" to impose a life sentence, under a recidivist statute, upon a defendant who had been convicted, successively, of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses. We said that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.*, at 274. We specifically rejected the proposition asserted by the dissent, *id.*, at 295 (opinion of Powell, J.), that unconstitutional disproportionality could be established by weighing three factors: (1) gravity of the offense compared to severity of the penalty, (2) penalties imposed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense. *Id.*, at 281–282, and n. 27. A footnote in the opinion, however, said: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment." *Id.*, at 274, n. 11.

Two years later, in *Hutto* v. *Davis*, 454 U. S. 370 (1982), we similarly rejected an Eighth Amendment challenge to a

prison term of 40 years and fine of $20,000 for possession and distribution of approximately nine ounces of marijuana. We thought that result so clear in light of *Rummel* that our *per curiam* opinion said the Fourth Circuit, in sustaining the constitutional challenge, "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system," which could not be tolerated "unless we wish anarchy to prevail," 454 U. S., at 374–375. And we again explicitly rejected application of the three factors discussed in the *Rummel* dissent.[2] See 454 U. S., at 373–374, and n. 2. However, whereas in *Rummel* we had said that successful proportionality challenges outside the context of capital punishment "have been exceedingly rare," 445 U. S., at 272 (discussing as the solitary example *Weems* v. *United States*, 217 U. S. 349 (1910), which we explained as involving punishment of a "unique nature," 445 U. S., at 274), in *Davis* we misdescribed *Rummel* as having said that "'successful challenges . . .' *should be* 'exceedingly rare,'" 454 U. S., at 374 (emphasis added), and at that point inserted a reference to, and description of, the *Rummel* "overtime parking" footnote, 454 U. S., at 374, n. 3. The content of that footnote was imperceptibly (but, in the event, ominously) expanded: *Rummel*'s "not [saying] that a proportionality principle would not come into play" in the fanciful parking example, 445 U. S., at 274, n. 11, became "not[ing] . . . that there could be situations in which the proportionality principle *would* come into play, *such as*" the fanciful parking example, *Davis*, *supra*, at 374, n. 3 (emphasis added). This combination of expanded text plus expanded footnote permitted the inference that gross disproportionality was an example of the "exceedingly rare" situations in which Eighth Amendment challenges "should be" successful. Indeed, one might say

[2] Specifically, we rejected, in some detail, the four-factor test promulgated by the Fourth Circuit in *Hart* v. *Coiner*, 483 F. 2d 136 (1973). This test included the three factors relied upon by the *Rummel* dissent. See *Hart*, *supra*, at 140–143.

that it positively invited that inference, were that not incompatible with the sharp *per curiam* reversal of the Fourth Circuit's finding that 40 years for possession and distribution of nine ounces of marijuana was grossly disproportionate and therefore unconstitutional.

A year and a half after *Davis* we uttered what has been our last word on this subject to date. *Solem* v. *Helm*, 463 U. S. 277 (1983), set aside under the Eighth Amendment, because it was disproportionate, a sentence of life imprisonment without possibility of parole, imposed under a South Dakota recividist statute for successive offenses that included three convictions of third-degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of third-offense driving while intoxicated, and one of writing a "no account" check with intent to defraud. In the *Solem* account, *Weems* no longer involved punishment of a "unique nature," *Rummel*, *supra*, at 274, but was the "leading case," *Solem*, 463 U. S., at 287, exemplifying the "general principle of proportionality," *id.*, at 288, which was "deeply rooted and frequently repeated in common-law jurisprudence," *id.*, at 284, had been embodied in the English Bill of Rights "in language that was later adopted in the Eighth Amendment," *id.*, at 285, and had been "recognized explicitly in this Court for almost a century," *id.*, at 286. The most recent of those "recognitions" were the "overtime parking" footnotes in *Rummel* and *Davis*, 463 U. S., at 288. As for the statement in *Rummel* that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative," *Rummel*, *supra*, at 274: according to *Solem*, the really important words in that passage were "'*one could argue*,'" 463 U. S., at 288, n. 14 (emphasis added in *Solem*). "The Court [in *Rummel*] . . . merely recognized that the argument was possible. To the extent that the State . . . makes this argument here, we find it meritless." *Id.*, at 289,

n. 14. (Of course *Rummel* had not said merely "one could argue," but "one could argue *without fear of contradiction by any decision of this Court.*" (Emphasis added.)) Having decreed that a general principle of disproportionality exists, the Court used as the criterion for its application the three-factor test that had been explicitly rejected in both *Rummel* and *Davis*. 463 U. S., at 291–292. Those cases, the Court said, merely "indicated [that] no one factor will be dispositive in a given case," *id.*, at 291, n. 17—though *Davis* had expressly, approvingly, and quite correctly described *Rummel* as having "disapproved *each of* [the] objective factors," 454 U. S., at 373 (emphasis added). See *Rummel*, 445 U. S., at 281–282, and n. 27.

It should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law. We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents, see *Payne* v. *Tennessee*, *ante*, at 828; *Smith* v. *Allwright*, 321 U. S. 649, 665, and n. 10 (1944); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 627–628 (1974) (Powell, J., concurring); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting), and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions. Accordingly, we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee—with particular attention to the background of the Eighth Amendment (which *Solem* discussed in only two pages, see 463 U. S., at 284–286) and to the understanding of the Eighth Amendment before the end of the 19th century (which *Solem* discussed not at all). We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.

B

Solem based its conclusion principally upon the proposition that a right to be free from disproportionate punishments was embodied within the "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689, and was incorporated, with that language, in the Eighth Amendment. There is no doubt that the Declaration of Rights is the antecedent of our constitutional text. (This document was promulgated in February 1689 and was enacted into law as the Bill of Rights, 1 Wm. & Mary, Sess. 2, ch. 2, in December 1689. See Sources of Our Liberties 222–223 (R. Perry & J. Cooper eds. 1959); L. Schwoerer, Declaration of Rights, 1689, pp. 279, 295–298 (1981).) In 1791, five State Constitutions prohibited "cruel or unusual punishments," see Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, § XXII (1776); Mass. Declaration of Rights, Art. XXVI (1780); N. C. Declaration of Rights, § X (1776); N. H. Bill of Rights, Art. XXXIII (1784), and two prohibited "cruel" punishments, Pa. Const., Art. IX, § 13 (1790); S. C. Const., Art. IX, § 4 (1790). The new Federal Bill of Rights, however, tracked Virginia's prohibition of "cruel *and* unusual punishments," see Va. Declaration of Rights, § 9 (1776), which most closely followed the English provision. In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."

Perhaps the Americans of 1791 understood the Declaration's language precisely as the Englishmen of 1689 did—though as we shall discuss later, that seems unlikely. Or perhaps the colonists meant to incorporate the content of that antecedent by reference, *whatever* the content might have been. *Solem* suggested something like this, arguing that since Americans claimed "all the rights of English subjects," "their use of the language of the English Bill of Rights is con-

vincing proof that they intended to provide at least the same protection," 463 U. S., at 286. Thus, not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular "rights of English subjects" it was designed to vindicate.

As *Solem* observed, 463 U. S., at 284–285, the principle of proportionality was familiar to English law at the time the Declaration of Rights was drafted. The Magna Carta provided that "[a] free man shall not be fined for a small offence, except in proportion to the measure of the offense; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold . . . ." Art. 20 (translated in Sources of Our Liberties, *supra*, at 15). When imprisonment supplemented fines as a method of punishment, courts apparently applied the proportionality principle while sentencing. *Hodges* v. *Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence"). Despite this familiarity, the drafters of the Declaration of Rights did not explicitly prohibit "disproportionate" or "excessive" punishments. Instead, they prohibited punishments that were "cruell and unusuall." The *Solem* Court simply assumed, with no analysis, that the one included the other. 463 U. S., at 285. As a textual matter, of course, it does not: a disproportionate punishment can perhaps always be considered "cruel," but it will not always be (as the text also requires) "unusual." The error of *Solem*'s assumption is confirmed by the historical context and contemporaneous understanding of the English guarantee.

Most historians agree that the "cruell and unusuall Punishments" provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II. See, *e. g.*, Schwoerer, *supra*, at 93; 4 W. Blackstone, Commentaries *372. They do not agree, how-

ever, on which abuses. See *Ingraham* v. *Wright*, 430 U. S. 651, 664–665 (1977); *Furman* v. *Georgia*, 408 U. S. 238, 317–319 (1972) (MARSHALL, J., concurring). Jeffreys is best known for presiding over the "Bloody Assizes" following the Duke of Monmouth's abortive rebellion in 1685; a special commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents. Some have attributed the Declaration of Rights provision to popular outrage against those proceedings. *E. g.*, Sources of Our Liberties, *supra*, at 236, n. 103; Note, What Is Cruel and Unusual Punishment, 24 Harv. L. Rev. 54, 55, n. 2 (1910); see also 3 J. Story, Commentaries on the Constitution of the United States § 1896 (1833).[3]

But the vicious punishments for treason decreed in the Bloody Assizes (drawing and quartering, burning of women felons, beheading, disembowling, etc.) were common in that period—indeed, they were specifically authorized by law and remained so for many years afterwards. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 855–856 (1969); 4 Blackstone, *supra*, at *369–*370. Thus, recently historians have argued, and the best historical evidence suggests, that it was not Jeffreys' management of the Bloody Assizes that led to the Declaration of Rights provision, but rather the arbitrary sentencing power he had exercised in administering justice from the King's Bench, particularly when punishing a notorious perjurer. See Granucci, *supra*, at 855–860; Schwoerer, *supra*, at 92–93. Accord, 1 J. Stephen, A History of the Criminal Law of England 490 (1883); 1 J. Chitty, Criminal Law 712 (5th Am. ed. 1847) (hereinafter Chitty). Jeffreys was widely accused of "inventing" special penalties for the King's enemies, penalties that were not authorized by common-law precedent or statute. Letter to a Gentleman at Brussels,

[3] *Solem* v. *Helm*, 463 U. S. 277 (1983), apparently adopted this interpretation, quoting, as it did, from one of these sources. See *id.*, at 285 (quoting Sources of Our Liberties 236 (R. Perry & J. Cooper eds. 1959)).

giving an account of the people's revolt (Windsor, Dec. 2, 1688), cited in L. Schwoerer, The Declaration of Rights, 1689, p. 93, n. 207 (1981).

The preamble to the Declaration of Rights, a sort of indictment of James II that calls to mind the preface to our own Declaration of Independence, specifically referred to illegal sentences and King's Bench proceedings.

> "Whereas the late King James the Second, by the Assistance of diverse evill Councellors Judges and Ministers imployed by him did endeavour to subvert and extirpate the Protestant Religion, and the Lawes and Liberties of this Kingdome.
>
> . . . . .
>
> "By Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegall Courses.
>
> . . . . .
>
> "[E]xcessive Baile hath beene required of Persons committed in Criminall Cases to elude the Benefit of the Lawes made for the Liberty of the Subjects.
>
> "And excessive Fines have been imposed.
>
> "And illegall and cruell Punishments inflicted.
>
> . . . . .
>
> "All which are utterly and directly contrary to the knowne Lawes and Statutes and Freedome of this Realme." 1 Wm. & Mary, Sess. 2, ch. 2 (1689).

The only recorded contemporaneous interpretation of the "cruell and unusuall Punishments" clause confirms the focus upon Jeffreys' King's Bench activities, and upon the illegality, rather than the disproportionality, of his sentences. In 1685 Titus Oates, a Protestant cleric whose false accusations had caused the execution of 15 prominent Catholics for allegedly organizing a "Popish Plot" to overthrow King Charles II in 1679, was tried and convicted before the King's Bench for perjury. Oates' crime, "bearing false witness against another, with an express premeditated design to take away his

life, so as the innocent person be condemned and executed," had, at one time, been treated as a species of murder, and punished with death. 4 Blackstone, *supra*, at *196. At sentencing, Jeffreys complained that death was no longer available as a penalty and lamented that "a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him." *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1314 (K. B. 1685). The law would not stand in the way, however. The judges met, and, according to Jeffreys, were in unanimous agreement that "crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member." *Ibid.* Another justice taunted Oates that "we have taken special care of you," *id.*, at 1316. The court then decreed that he should pay a fine of "1000 marks upon each Indictment," that he should be "stript of [his] Canonical Habits," that he should stand in the pillory annually at certain specified times and places, that on May 20 he should be whipped by "the common hangman" "from Aldgate to Newgate," that he should be similarly whipped on May 22 "from Newgate to Tyburn," and that he should be imprisoned for life. *Ibid.*

"The judges, as they believed, sentenced Oates to be scourged to death." 2 T. Macaulay, History of England 204 (1899) (hereinafter Macaulay). Accord, D. Ogg, England In The Reigns of James II and William III, pp. 154–155 (1984). Oates would not die, however. Four years later, and several months after the Declaration of Rights, he petitioned the House of Lords to set aside his sentence as illegal. 6 Macaulay 138–141. "Not a single peer ventured to affirm that the judgment was legal: but much was said about the odious character of the appellant," and the Lords affirmed the judgment. 6 *id.*, at 140–141. A minority of the Lords dissented, however, and their statement sheds light on the meaning of the "cruell and unusuall Punishments" clause:

"1st, [T]he King's Bench, being a Temporal Court, made it a Part of the Judgment, That Titus Oates, being a Clerk, should, for his said Perjuries, be divested of his canonical and priestly Habit . . . ; which is a Matter wholly out of their Power, belonging to the Ecclesiastical Courts only.

"2dly, [S]aid Judgments are barbarous, inhuman, and unchristian; and there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury; which yet were but Part of the Punishments inflicted upon him.

. . . . . .

"4thly, [T]his will be an Encouragement and Allowance for giving the like cruel, barbarous and illegal Judgments hereafter, unless this Judgment be reversed.

"5thly, . . . [T]hat the said Judgments were contrary to Law and ancient Practice, and therefore erroneous, and ought to be reversed.

"6thly, Because it is contrary to the Declaration, on the Twelfth of February last, . . . that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments afflicted." 1 Journals of the House of Lords 367 (May 31, 1689), quoted in *Second Trial of Titus Oates*, *supra*, at 1325.

Oates' cause then aroused support in the House of Commons, whose members proceeded to pass a bill to annul the sentence. A "free conference" was ultimately convened in which representatives of the House of Commons attempted to persuade the Lords to reverse their position. See 6 Macaulay 143–145. Though this attempt was not successful, the Commons' report of the conference confirms that the "cruell and unusuall Punishments" clause was directed at the Oates case (among others) in particular, and at illegality, rather than disproportionality, of punishment in general.

"[T]he Commons had hoped, That, after the Declaration [of Rights] presented to their Majesties upon their

accepting the Crown (wherein their Lordships had joined with the Commons in complaining of the cruel and illegal Punishments of the last Reign; and in asserting it to be the ancient Right of the People of *England* that they should not be subjected to *cruel and unusual Punishments;* and that no Judgments to the Prejudice of the People in that kind ought in any wise to be drawn into Consequence, or Example); and after this Declaration had been so lately renewed in that Part of the Bill of Rights which the Lords have agreed to; they should not have seen Judgments of this Nature affirmed, and been put under a Necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious Consequence to the People, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the Meaning of those Declarations.

"*That the Commons had a particular Regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it,* That they are erroneous, cruel, illegal, and of ill Example to future Ages . . . .

. . . . .

"That it seemed no less plain, That the Judgments were cruel, and of ill Example to future Ages.

"That it was surely of ill Example for a Temporal Court to give Judgment, 'That a Clerk be divested of his Canonical Habits; and continue so divested during his Life.'

"That it was of ill Example, and illegal, That a Judgment of perpetual Imprisonment should be given in a Case, where there is no express Law to warrant it.

"It was of ill Example, and unusual, That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life.

> "That it was illegal, cruel, and of dangerous Example, That a Freeman should be whipped in such a barbarous manner, as, in Probability, would determine in Death.
>
> . . . . . .
>
> "That this was avowed, when these Judgments was *[sic]* given by the then Lord Chief Justice of the King's Bench; who declared; 'That all the Judges had met; and unanimously agreed, That where the Subject was prosecuted at Common Law for a Misdemeanor, it was in the Discretion of the Court, to inflict what Punishment they pleased, not extending to Life, or Member.'
>
> "That as soon as they had set up this Pretence to a discretionary Power, it was observable how they put it in Practice, not only in this, but in other Cases, and for other Offences, by inflicting such cruel and ignominious Punishments, as will be agreed to be far worse than Death itself to any Man who has a sense of Honour or Shame . . . ." 10 Journal of the House of Commons 247 (Aug. 2, 1689) (emphasis added).

In all these contemporaneous discussions, as in the prologue of the Declaration, a punishment is not considered objectionable because it is disproportionate,[4] but because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to warrant," "unusual," "illegal," or imposed by "Pretence to a discretionary Power." Accord, 2 Macaulay 204 (observing that Oates' punishment, while deserved, was unjustified by law). Moreover, the phrase "cruell and unusuall" is treated as interchangeable with "cruel and illegal." In other words, the

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[4] Indeed, it is not clear that, by the standards of the age, Oates' sentence *was* disproportionate, given that his perjuries resulted in the deaths of 15 innocents. Granucci suggests that it was not. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 859, and n. 97 (1969). And Macaulay observed that Oates' "sufferings, great as they might seem, had been trifling when compared with his crimes." 6 Macaulay 137. See also 2 *id.*, at 203–204.

"illegall and cruell Punishments" of the Declaration's prologue, see *supra*, at 969, are the same thing as the "cruell and unusuall Punishments" of its body. (JUSTICE MARSHALL's concurrence in *Furman* v. *Georgia*, 408 U. S., at 318, observes that an earlier draft of the body prohibited "illegal" punishments, and that the change "appears to be inadvertent." See also 1 Chitty 712 (describing Declaration of Rights as prohibiting "cruel and illegal" punishments).) In the legal world of the time, and in the context of restricting punishment determined by the Crown (or the Crown's judges), "illegall" and "unusuall" were identical for practical purposes. Not all punishments were specified by statute; many were determined by the common law. Departures from the common law were lawful only if authorized by statute. See 1 J. Stephen, A History of the Criminal Law of England 489–490 (1883); 1 Chitty 710. A requirement that punishment not be "unusuall"—that is, not contrary to "usage" (Lat. "usus") or "precedent"—was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition. 1 *id.*, at 710–712; *Ingraham* v. *Wright*, 430 U. S., at 665 (English provision aimed at "judges acting beyond their lawful authority"); Granucci, 57 Calif. L. Rev., at 859; cf. 4 W. Blackstone, Commentaries *371–*373.

In sum, we think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid "disproportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Declaration of Rights, which happened to be included in the Eighth Amendment. Indeed, even those scholars who believe the principle to have been included within the Declaration of Rights do not contend that such a prohibition was reflected in English practice—nor could they. See Granucci,

supra, at 847.[5] For, as we observed in *Woodson* v. *North Carolina*, 428 U. S. 280, 289 (1976), in 1791, England punished over 200 crimes with death. See also 1 Stephen, *supra*, at 458, 471–472 (until 1826, all felonies, except mayhem and petty larceny, were punishable by death). By 1830 the class of offenses punishable by death was narrowed to include "only" murder; attempts to murder by poisoning, stabbing, shooting, etc.; administering poison to procure abortion; sodomy; rape; statutory rape; and certain classes of forgery. See 1 Stephen, *supra*, at 473–474. It is notable that, during his discussion of English capital punishment reform, Stephen does not once mention the Cruell and Unusuall Punishments Clause, though he was certainly aware of it. See 1 Stephen, *supra*, at 489–490. Likewise, in his discussion of the suitability of punishments, Blackstone does not mention the Declaration. See 4 Blackstone, *supra*, at *9–*19.

C

Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what "cruell and unusuall punishments" meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment. Even if one assumes that the Founders knew the precise meaning of that English antecedent, but see Granucci, *supra*, at 860–865, a direct transplant of the English meaning to the soil of American constitutionalism would in any case have been impossible. There were no common-law punishments in the federal system, see *United States* v. *Hudson*, 7 Cranch 32 (1812), so that the provision must have been meant as a check not upon judges but upon

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[5] Contrary to JUSTICE WHITE's suggestion, *post*, at 1011–1012, n. 1, Granucci provides little (if any) direct evidence that the Declaration of Rights embodied a proportionality principle. He simply reasons that, because English law was concerned with proportionality, the Declaration of Rights must have embodied such a principle. Granucci, *supra*, at 844–847.

the Legislature. See, *e. g.*, *In re Kemmler*, 136 U. S. 436, 446–447 (1890).

Wrenched out of its common-law context, and applied to the actions of a legislature, the word "unusual" could hardly mean "contrary to law." But it continued to mean (as it continues to mean today) "such as [does not] occu[r] in ordinary practice," Webster's American Dictionary (1828), "[s]uch as is [not] in common use," Webster's Second International Dictionary 2807 (1954). According to its terms, then, by forbidding "cruel *and unusual* punishments," see *Stanford* v. *Kentucky*, 492 U. S. 361, 378 (1989) (plurality opinion); *In re Kemmler*, *supra*, at 446–447, the Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed. *E. g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947) (plurality opinion); *In re Kemmler*, *supra*, at 446–447. See also *United States* v. *Collins*, 25 F. Cas. 545 (No. 14,836) (CC R. I. 1854) (Curtis, J.).

The language bears the construction, however—and here we come to the point crucial to resolution of the present case—that "cruelty and unusualness" are to be determined not solely with reference to the punishment at issue ("Is life imprisonment a cruel and unusual punishment?") but with reference to the crime for which it is imposed as well ("Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?"). The latter interpretation would make the provision a form of proportionality guarantee.[6] The arguments against it, however, seem to us conclusive.

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[6] JUSTICE WHITE apparently agrees that the Clause outlaws particular "modes" of punishment. He goes on to suggest, however, that because the Founders did not specifically *exclude* a proportionality component from words that "could reasonably be construed to include it," the Eighth Amendment *must* prohibit disproportionate punishments as well. *Post*, at 1011. Surely this is an extraordinary method for determining what restrictions upon democratic self-government the Constitution contains. It seems to us that our task is not merely to identify various meanings that

First of all, to use the phrase "cruel and unusual punishment" to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty (though then as now there was little agreement over what it entailed). In 1778, for example, the Virginia Legislature narrowly rejected a comprehensive "Bill for Proportioning Punishments" introduced by Thomas Jefferson. See 4 W. Blackstone, Commentaries 18 (H. Tucker ed. 1803) (discussing efforts at reform); 1 Writings of Thomas Jefferson 218–239 (A. Lipscomb ed. 1903). Proportionality provisions had been included in several State Constitutions. See, *e. g.*, Pa. Const., § 38 (1776) (punishments should be "in general more proportionate to the crimes"); S. C. Const., Art. XL (1778) (same); N. H. Bill of Rights, Art. XVIII (1784) ("[A]ll penalties ought to be proportioned to the nature of the offence"). There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions,[7] yet chose not to replicate them. Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of "cruel and unusual punishments" ("cruel *or* unusual," in New Hampshire's case) *and* a requirement that

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the text "could reasonably" bear, and then impose the one that from a policy standpoint pleases us best. Rather, we are to strive as best we can to select from among the various "reasonable" possibilities *the most plausible* meaning. We do not bear the burden of "proving an affirmative decision against the proportionality component," *ibid.*; rather, JUSTICE WHITE bears the burden of proving an affirmative decision in its favor. For if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process.

[7] Printed collections of State Constitutions were available to the Founders, see The Federalist No. 24, p. 159, n. (C. Rossiter ed. 1961) (A. Hamilton); see also *id.*, No. 47, pp. 304–307 (J. Madison) (comparing constitutions of all 13 States).

"all penalties ought to be proportioned to the nature of the offence." N. H. Bill of Rights, Arts. XVIII, XXXIII (1784). Ohio Const., Art. VIII, §§ 13, 14 (1802).[8]

Secondly, it would seem quite peculiar to refer to cruelty and unusualness *for the offense in question*, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones. Finally, and most conclusively, as we proceed to discuss, the fact that what was "cruel and unusual" under the Eighth Amendment was to be determined without reference to the particular offense is confirmed by all available evidence of contemporary understanding.[9]

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[8] The New Hampshire proportionality provision, by far the most detailed of the *genre*, read: "All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind." N. H. Const., Pt. I, Art. XVIII (1784).

The Ohio provision copied that of New Hampshire.

[9] JUSTICE WHITE suggests that because the Framers prohibited "excessive fines" (which he asserts, and we will assume for the sake of argument, means "disproportionate fines"), they must have meant to prohibit "excessive" punishments as well. *Post*, at 1009. This argument apparently did not impress state courts in the 19th century, and with good reason. The logic of the matter is quite the opposite. If "cruel and unusual punishments" included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous. When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed. See *Walton* v. *Arizona*, 497 U. S. 639, 669–670 (1990) (SCALIA, J., concurring in part and concurring in judgment).

But, it might be argued, why would any rational person be careful to forbid the disproportionality of fines but provide no protection against the disproportionality of more severe punishments? Does not the one suggest

The Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights. However, what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights as well as the floor debates in the First Congress which proposed it "confirm[s] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." Granucci, 57 Calif. L. Rev., at 842 (emphasis added). See Schwartz, Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel, 71 J. Crim. L. & Criminology 378, 378–382 (1980); Welling & Hipfner, Cruel and Unusual?: Capital Punishment in Canada, 26 U. Toronto L. J. 55, 61 (1976).

In the January 1788 Massachusetts Convention, for example, the objection was raised that Congress was

> "nowhere restrained from inventing the most *cruel and unheard-of* punishments, and annexing them to crimes; and there is no constitutional check on [it], but that *racks* and *gibbets* may be amongst the most mild instruments of [its] discipline." 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (emphasis added).

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the existence of the other? Not at all. There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. See *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 25–26 (1977); *Perry* v. *United States*, 294 U. S. 330, 350–351 (1935). (We relied upon precisely the lack of this incentive for abuse in holding that "punitive damages" were not "fines" within the meaning of the Eighth Amendment. *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 271–276 (1989)). Thus, some early State Constitutions prohibited excessive fines without placing any restrictions on other modes of punishment. *E. g.*, Conn. Declaration of Rights, Art. I, § 13 (1818) (prohibiting excessive fines only); Ga. Const., Art. LIX (1777) (same).

In the Virginia Convention, Patrick Henry decried the absence of a bill of rights, stating:

> "What says our [Virginia] Bill of Rights?—'that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' . . .
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> "In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment." 3 *id.*, at 447.

The actions of the First Congress, which are of course persuasive evidence of what the Constitution means, *Marsh* v. *Chambers*, 463 U. S. 783, 788–790 (1983); *Carroll* v. *United States*, 267 U. S. 132, 150–152 (1925); cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 401–402 (1819), belie any doctrine of proportionality. Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code. See 1 Stat. 112–119 (1790). As the then-extant New Hampshire Constitution's proportionality provision didactically observed, "[n]o wise legislature"—that is, no legislature attuned to the principle of proportionality—"will afix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason," N. H. Const., Pt. I, Art. XVIII (1784). Jefferson's Bill For Proportioning Crimes and Punishments punished murder and treason by death; counterfeiting of public securities by forfeiture of property plus six years at hard labor, and "run[ning] away with any sea-vessel or goods laden on board thereof" by treble damages to the victim and five years at hard labor. See 1 Writings of Thomas Jefferson, at 220–222, 229–231 (footnote omitted). Shortly after proposing the Bill of Rights, the First Congress ignored these teachings. It punished forgery of United States securities, "run[ning] away with [a] ship or vessel, or any goods or merchandise to the value

of fifty dollars," treason, and murder on the high seas with the same penalty: death by hanging. 1 Stat. 114. The lawbooks of the time are devoid of indication that anyone considered these newly enacted penalties unconstitutional by virtue of their disproportionality. Cf. *United States* v. *Tully*, 28 F. Cas. 226 (No. 16,545) (CC Mass. 1812) (Story and Davis, JJ.) (Force or threat thereof not an element of "run[n]ing away with [a] ship or vessel").

The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment. One commentator wrote:

> "The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840).

Another commentator, after explaining (in somewhat convoluted fashion) that the "spirit" of the Excessive Bail and Excessive Fines Clauses forbade excessive imprisonments, went on to add:

> "Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rending assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution." B. Oliver, The Rights of An American Citizen 186 (1832).

Chancellor Kent, in a paragraph of his Commentaries arguing that capital punishment "ought to be confined to the few cases of the most atrocious character," does not suggest that the "Cruel and Unusual Punishments" Clauses of State or Federal Constitutions require such proportionality—even though the very paragraph in question begins with the statement that "cruel and unusual punishments are universally condemned." 2 J. Kent, Commentaries on American Law 10–11 (1827). And Justice Story had this to say:

> "The provision [the Eighth Amendment] would seem wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts." 3 J. Story, Commentaries on the Constitution of the United States § 1896 (1833).

Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment: During the 19th century several States ratified constitutions that prohibited "cruel and unusual," "cruel or unusual," or simply "cruel" punishments *and* required *all* punishments to be proportioned to the offense. Ohio Const., Art. VIII, §§ 13, 14 (1802); Ind. Const., Art. I, §§ 15–16 (1816); Me. Const., Art. I, § 9 (1819); R. I. Const., Art. I, § 8 (1842); W. Va. Const., Art. II, § 2 (1861–1863); Ga. Const., Art. I, §§ 16, 21 (1868).

Perhaps the most persuasive evidence of what "cruel and unusual" meant, however, is found in early judicial constructions of the Eighth Amendment and its state counterparts. An early (perhaps the earliest) judicial construction of the federal provision is illustrative. In *Barker* v. *People*, 20 Johns. *457 (N. Y. Sup. Ct. 1823), aff'd, 3 Cow. 686 (N. Y. 1824), the defendant, upon conviction of challenging another to a duel, had been disenfranchised. Chief Justice Spencer

assumed that the Eighth Amendment applied to the States, and in finding that it had not been violated considered the proportionality of the punishment irrelevant. "The disenfranchisement of a citizen," he said, "is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences." *Barker* v. *People*, *supra*, at *459.

Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (*i. e.*, "cruel *or* unusual") concluded that these provisions did not proscribe disproportionality but only certain modes of punishment. For example, in *Aldridge* v. *Commonwealth*, 4 Va. 447 (1824), the General Court of Virginia had occasion to interpret the cruel and unusual punishments clause that was the direct ancestor of our federal provision, see *supra*, at 966. In rejecting the defendant's claim that a sentence of so many as 39 stripes violated the Virginia Constitution, the court said:

> "As to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment. . . . [T]he best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment." 4 Va., at 449–450 (emphasis in original).

Accord, *Commonwealth* v. *Hitchings*, 71 Mass. 482, 486 (1855); *Garcia* v. *Territory*, 1 N. M. 415, 417–419 (1869);

Whitten v. *Georgia*, 47 Ga. 297, 301 (1872); *Cummins* v. *People*, 42 Mich. 142, 143–144, 3 N. W. 305 (1879); *State* v. *Williams*, 77 Mo. 310, 312–313 (1883); *State* v. *White*, 44 Kan. 514, 520–521, 25 P. 33, 34–35 (1890); *People* v. *Morris*, 80 Mich. 634, 638, 45 N. W. 591, 592 (1890); *Hobbs* v. *State*, 133 Ind. 404, 408–410, 32 N. E. 1019, 1020–1021 (1893); *State* v. *Hogan*, 63 Ohio St. 202, 218, 58 N. E. 572, 575 (1900); see also *In re Bayard*, 25 Hun. 546, 549–550 (N. Y. 1881). In the 19th century, judicial agreement that a "cruel and unusual" (or "cruel or unusual") provision did not constitute a proportionality requirement appears to have been universal.[10] One case, late in the century, suggested in dictum, not a full-

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[10] Neither *State* v. *Driver*, 78 N. C. 423 (1878), nor *State ex rel. Garvey* v. *Whitaker*, 48 La. 527, 19 So. 457 (1896), is to the contrary. They are examples of applying, not a proportionality principle, but rather the principle (curiously in accord with the original meaning of the phrase in the English Declaration of Rights, discussed above) that a punishment is "cruel and unusual" if it is illegal because not sanctioned by common law or statute. In *Driver*, the court had imposed a sentence of five years in a county jail for the common-law offense of assault and battery, for which no statutory penalty had been established. The North Carolina Supreme Court held the sentence to violate the State's "cruel or unusual punishment" provision because a county jail is "a close prison, where life is soon in jeopardy," and no prisoner had *ever* "been imprisoned for five years in a County jail for *any* crime however aggravated." 78 N. C., at 425, 426–427. A subsequent North Carolina case makes it clear that when the legislature has prescribed a penalty of a traditional mode, the penalty's severity for the offense in question cannot violate the State's "cruel or unusual punishment" clause. *State* v. *Blake*, 157 N. C. 608, 611, 72 S. E. 1080, 1081–1082 (1911).

In *Garvey*, the defendants were sentenced to nearly six years in jail for trespassing on public property. The sentence prescribed by the relevant city ordinance was 30 days, but the defendants' 1-hour 40-minute occupation had been made the subject of 72 separate counts, "each offence embracing only one and one-half minutes and one offence following after the other immediately and consecutively," 48 La., at 533, 19 So., at 459. The Louisiana Supreme Court found the sentence to have been cruel and unusual "considering the offence to have been a continuing one," *ibid.* We think it a fair reading of the case that the sentence was cruel and unusual because it was illegal.

fledged proportionality principle, but at least the power of the courts to intervene "in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." *State* v. *Becker*, 3 S. D. 29, 41, 51 N. W. 1018, 1022 (1892). That case, however, involved a constitutional provision proscribing all punishments that were merely "cruel," S. D. Const., Art. VI, § 23 (1889). A few decisions early in the present century cited it (again in dictum) for the proposition that a sentence "so out of proportion to the offense . . . as to 'shock public sentiment and violate the judgment of reasonable people'" would be "cruel and unusual." *Jackson* v. *United States*, 102 F. 473, 488 (CA9 1900); *Territory* v. *Ketchum*, 10 N. M. 718, 723, 65 P. 169, 171 (1901).

II

We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice—a reason that reinforces the necessity of overruling *Solem*. While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis. Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is "disproportionate"; yet as some of the examples mentioned above indicate, many enacted dispositions seem to be so—because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology. This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are

certain never to occur.[11] The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

This becomes clear, we think, from a consideration of the three factors that *Solem* found relevant to the proportionality determination: (1) the inherent gravity of the offense, (2) the

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[11] JUSTICE WHITE argues that the Eighth Amendment must contain a proportionality principle because otherwise legislatures could "mak[e] overtime parking a felony punishable by life imprisonment." *Post*, at 1018. We do not in principle oppose the "parade of horribles" form of argumentation, see Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 590–593 (1989–1990); but its strength is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize. Here, for the reasons we have discussed, there is no cause to believe that the provision was meant to exclude the evil of a disproportionate punishment. JUSTICE WHITE's argument has force only for those who believe that the Constitution prohibited everything that is intensely undesirable—which is an obvious fallacy, see Art. I, § 9 (implicitly permitting slavery); Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981). Nor is it likely that the horrible example imagined would ever in fact occur, unless, of course, overtime parking should one day become an arguably major threat to the common good, and the need to deter it arguably critical—at which time the Members of this Court would probably disagree as to whether the punishment really *is* "disproportionate," even as they disagree regarding the punishment for possession of cocaine today. As Justice Frankfurter reminded us, "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." *New York* v. *United States*, 326 U. S. 572, 583 (1946). It seems to us no more reasonable to hold that the Eighth Amendment forbids "disproportionate punishment" because otherwise the State could impose life imprisonment for a parking offense than it would be to hold that the Takings Clause forbids "disproportionate taxation" because otherwise the State could tax away all income above the subsistence level.

sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. 463 U. S., at 290–291. As to the first factor: Of course some offenses, involving violent harm to human beings, will always and everywhere be regarded as serious, but that is only half the equation. The issue is *what else* should be regarded to be *as serious* as these offenses, or even to be *more serious* than some of them. On that point, judging by the statutes that Americans have enacted, there is enormous variation—even within a given age, not to mention across the many generations ruled by the Bill of Rights. The State of Massachusetts punishes sodomy more severely than assault and battery, compare Mass. Gen. Laws § 272:34 (1988) ("not more than twenty years" in prison for sodomy) with § 265:13A ("not more than two and one half years" in prison for assault and battery); whereas in several States, sodomy is not unlawful *at all*. In Louisiana, one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket "from the parking area or grounds of any store . . . without authorization." La. Rev. Stat. Ann. §§ 14:37, 14:68.1 (West 1986). A battery that results in "protracted and obvious disfigurement" merits imprisonment "for not more than five years," § 14:34.1, one half the maximum penalty for theft of livestock or an oilfield seismograph, §§ 14:67.1, 14:67.8. We may think that the First Congress punished with clear disproportionality when it provided up to seven years in prison and up to $1,000 in fine for "cut[ting] off the ear or ears, . . . cut[ting] out or disabl[ing] the tongue, . . . put[ting] out an eye, . . . cut[ting] off . . . any limb or member of any person with intention . . . to maim or disfigure," but provided the death penalty for "run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars." Act of Apr. 30, 1790, ch. 9, §§ 8, 13, 1 Stat. 113–115. But then perhaps the citizens of 1791 would think that today's Congress punishes with clear disproportionality when it sanc-

tions "assault by . . . wounding" with up to six months in prison, 18 U. S. C. § 113(d), unauthorized reproduction of the "Smokey Bear" character or name with the same penalty, 18 U. S. C. § 711, offering to barter a migratory bird with up to two years in prison, 16 U. S. C. § 707(b), and purloining a "key suited to any lock adopted by the Post Office Department" with a prison term of up to 10 years, 18 U. S. C. § 1704. Perhaps both we and they would be right, but the point is that there are no textual or historical standards for saying so.

The difficulty of assessing gravity is demonstrated in the very context of the present case: Petitioner acknowledges that a mandatory life sentence might not be "grossly excessive" for possession of cocaine with intent to distribute, see *Hutto* v. *Davis*, 454 U. S. 370 (1982). But surely whether it is a "grave" offense merely to possess a significant quantity of drugs—thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute—depends entirely upon how odious and socially threatening one believes drug use to be. Would it be "grossly excessive" to provide life imprisonment for "mere possession" of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as "grave" as the possible dissemination of heavy weapons. Who are we to say no? The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.

The second factor suggested in *Solem* fails for the same reason. One cannot compare the sentences imposed by the jurisdiction for "similarly grave" offenses if there is no objective standard of gravity. Judges will be comparing what *they* consider comparable. Or, to put the same point differently: When it happens that two offenses judicially determined to be "similarly grave" receive significantly *dis*similar penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not

share the judges' view that the offenses are similarly grave. Moreover, even if "similarly grave" crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation. Whether these differences will occur, and to what extent, depends, of course, upon the weight the society accords to deterrence and rehabilitation, rather than retribution, as the objective of criminal punishment (which is an eminently legislative judgment). In fact, it becomes difficult even to speak intelligently of "proportionality," once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law. Cf. Bill For Proportioning Punishments, 1 Writings of Thomas Jefferson, at 218, 228–229 ("[W]hoever . . . shall maim another, or shall disfigure him . . . shall be maimed or disfigured in like sort").

As for the third factor mentioned by *Solem*—the character of the sentences imposed by other States for the same crime—it must be acknowledged that that can be applied with clarity and ease. The only difficulty is that it has no conceivable relevance to the Eighth Amendment. That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize *at all*. Indeed, a State may criminalize an act that other States choose to *reward*—punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What

greater disproportion could there be than that? "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U. S., at 282. Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense, see Wyo. Stat. §35–7–1031(c) (1988) (6 months); W. Va. Code §60A–4–401(c) (1989) (6 months), nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.

III

Our 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no proportionality requirement in the Eighth Amendment, but neither has it departed to the extent that *Solem* suggests. In *Weems* v. *United States*, 217 U. S. 349 (1910), a government disbursing officer convicted of making false entries of small sums in his account book was sentenced by Philippine courts to 15 years of *cadena temporal*. That punishment, based upon the Spanish Penal Code, called for incarceration at "'hard and painful labor'" with chains fastened to the wrists and ankles at all times. Several "accessor[ies]" were superadded, including permanent disqualification from holding any position of public trust, subjection to "[government] surveillance" for life, and "civil interdiction," which consisted of deprivation of "'the rights of parental authority, guardianship of person or property, participation in the family council[, etc.]'" *Weems*, *supra*, at 364.

Justice McKenna, writing for himself and three others, held that the imposition of *cadena temporal* was "Cruel and Unusual Punishment." (Justice White, joined by Justice Holmes, dissented.) That holding, and some of the reasoning upon which it was based, was not at all out of accord with the traditional understanding of the provision we have described above. The punishment was both (1) severe *and* (2) unknown to Anglo-American tradition. As to the former, Justice McKenna wrote:

> "No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain." 217 U. S., at 366–367.

As to the latter:

> "It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character." *Id.*, at 377.

Other portions of the opinion, however, suggest that mere disproportionality, by itself, might make a punishment cruel and unusual:

> "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*, at 366–367.
>
> "[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Id.*, at 371,

quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting).

Since it contains language that will support either theory, our later opinions have used *Weems*, as the occasion required, to represent either the principle that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed," *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977), or the principle that only a "unique . . . punishmen[t]," a form of imprisonment different from the "more traditional forms . . . imposed under the Anglo-Saxon system," can violate the Eighth Amendment, *Rummel*, *supra*, at 274–275. If the proof of the pudding is in the eating, however, it is hard to view *Weems* as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement, either here or in the lower federal courts, for six decades. In *Graham* v. *West Virginia*, 224 U. S. 616 (1912), for instance, we evaluated (and rejected) a claim that life imprisonment for a third offense of horse theft was "cruel and unusual." We made no mention of *Weems*, although the petitioner had relied upon that case.[12] See also *Badders* v. *United States*, 240 U. S. 391 (1916).

Opinions in the Federal Courts of Appeals were equally devoid of evidence that this Court had announced a general proportionality principle. Some evaluated "cruel and unusual punishment" claims without reference to *Weems*. See, *e. g.*, *Bailey* v. *United States*, 284 F. 126 (CA7 1922); *Tincher* v. *United States*, 11 F. 2d 18, 21 (CA4 1926). Others continued to echo (in dictum) variants of the dictum in *State* v. *Becker*, 3 S. D. 29, 51 N. W. 1018 (1892), to the effect that courts will not interfere with punishment unless it is "manifestly cruel

[12] At the time we decided *Graham*, it was not clear that the Eighth Amendment was applicable to the States, but our opinion obviously assumed that it was. See *Rummel* v. *Estelle*, 445 U. S. 263, 277, n. 13 (1980).

and unusual," and cited *Weems* for the proposition that sentences imposed within the limits of a statute "ordinarily will not be regarded as cruel and unusual." See, *e. g.*, *Sansone* v. *Zerbst*, 73 F. 2d 670, 672 (CA10 1934); *Bailey* v. *United States*, 74 F. 2d 451, 453 (CA10 1934).[13] Not until more than half a century after *Weems* did the Circuit Courts begin performing proportionality analysis. *E. g.*, *Hart* v. *Coiner*, 483 F. 2d 136 (CA4 1973). Even then, some continued to state that "[a] sentence within the statutory limits is not cruel and unusual punishment." *Page* v. *United States*, 462 F. 2d 932, 935 (CA3 1972). Accord, *Rener* v. *Beto*, 447 F. 2d 20, 23 (CA5 1971); *Anthony* v. *United States*, 331 F. 2d 687, 693 (CA9 1964).

The first holding of this Court unqualifiedly applying a requirement of proportionality to criminal penalties was issued 185 years after the Eighth Amendment was adopted.[14] In

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[13] State Supreme Courts reacted to *Weems* in various ways. The Virginia Supreme Court suggested that, since only four Justices had joined the majority opinion, the proportionality question "may be fairly said to be still an open question in so far as the authority of the Supreme Court is concerned." *Hart* v. *Commonwealth*, 131 Va. 726, 745, 109 S. E. 582, 588 (1921). Cf. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 616–619 (1975) (BLACKMUN, J., dissenting). The Supreme Court of Indiana apparently thought *Weems* to be in accord with the traditional view expressed in *Hobbs* v. *State*, 133 Ind. 404, 32 N. E. 1019 (1893). See *Kistler* v. *State*, 190 Ind. 149, 158, 129 N. E. 625, 628 (1921). The North Carolina Supreme Court, after stating that *Weems* contained "an interesting historical review," went on to hold that, under North Carolina's "similar provision," punishment fixed by the legislature "cannot be excessive." *State* v. *Blake*, 157 N. C. 608, 611, 72 S. E. 1080, 1081–1082 (1911).

[14] In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court invalidated a 90-day prison sentence for the crime of being "addicted to the use of narcotics." The opinion does not cite *Weems* and rests upon the proposition that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," 370 U. S., at 667. Despite the Court's statement to the contrary in *Solem* v. *Helm*, 463 U. S., at 287, there is no reason to believe that the decision was an application of the principle of proportionality. See *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977).

Coker v. *Georgia*, *supra*, the Court held that, because of the disproportionality, it was a violation of the Cruel and Unusual Punishments Clause to impose capital punishment for rape of an adult woman. Five years later, in *Enmund* v. *Florida*, 458 U. S. 782 (1982), we held that it violates the Eighth Amendment, because of disproportionality, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant's intent to kill. *Rummel*, 445 U. S. 263 (1980), treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. We think that is an accurate explanation, and we reassert it. Proportionality review is one of several respects in which we have held that "death is different," and have imposed protections that the Constitution nowhere else provides. See, *e. g.*, *Turner* v. *Murray*, 476 U. S. 28, 36–37 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *id.*, at 117 (O'CONNOR, J., concurring); *Beck* v. *Alabama*, 447 U. S. 625 (1980). We would leave it there, but will not extend it further.

IV

Petitioner claims that his sentence violates the Eighth Amendment for a reason in addition to its alleged disproportionality. He argues that it is "cruel and unusual" to impose a mandatory sentence of such severity, without any consideration of so-called mitigating factors such as, in his case, the fact that he had no prior felony convictions. He apparently contends that the Eighth Amendment requires Michigan to create a sentencing scheme whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation.

As our earlier discussion should make clear, this claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in

various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. See *Woodson* v. *North Carolina*, 428 U. S., at 289–290. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory." See *Chapman* v. *United States*, 500 U. S. 453, 467 (1991).

Petitioner's "required mitigation" claim, like his proportionality claim, does find support in our death penalty jurisprudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate"—whether or not the sentence is "grossly disproportionate." See *Woodson* v. *North Carolina*, *supra*; *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Eddings* v. *Oklahoma*, *supra*; *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). Petitioner asks us to extend this so-called "individualized capital-sentencing doctrine," *Sumner* v. *Shuman*, 483 U. S. 66, 73 (1987), to an "individualized mandatory life in prison without parole sentencing doctrine." We refuse to do so.

Our cases creating and clarifying the "individualized capital sentencing doctrine" have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties. See *Eddings* v. *Oklahoma*, 455 U. S., at 110–112; *id.*, at 117–118 (O'CONNOR, J., concurring); *Lockett* v. *Ohio*, *supra*, at 602–605; *Woodson* v. *North Carolina*, *supra*, at 303–305; *Rummel* v. *Estelle*, *supra*, at 272.

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept

of humanity." *Furman* v. *Georgia*, 408 U. S., at 306 (Stewart, J., concurring).

It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment *with* possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, see *Lockett*, *supra*, at 605 (Burger, C. J.) (plurality opinion), it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment—for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

The judgment of the Michigan Court of Appeals is

Affirmed.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

I concur in Part IV of the Court's opinion and in the judgment. I write this separate opinion because my approach to the Eighth Amendment proportionality analysis differs from JUSTICE SCALIA's. Regardless of whether JUSTICE SCALIA or JUSTICE WHITE has the best of the historical argument, compare *ante*, at 966–985, with *post*, at 1009–1011, and n. 1, *stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years. Although our proportionality decisions have not been clear or consistent in all respects,

they can be reconciled, and they require us to uphold petitioner's sentence.

I

A

Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle. We first interpreted the Eighth Amendment to prohibit "'greatly disproportioned'" sentences in *Weems* v. *United States*, 217 U. S. 349, 371 (1910), quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 340 (1892) (Field, J., dissenting). Since *Weems*, we have applied the principle in different Eighth Amendment contexts. Its most extensive application has been in death penalty cases. In *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977), we held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." We applied like reasoning in *Enmund* v. *Florida*, 458 U. S. 782 (1982), to strike down a capital sentence imposed for a felony-murder conviction in which the defendant had not committed the actual murder and lacked intent to kill. Cf. *Tison* v. *Arizona*, 481 U. S. 137 (1987).

The Eighth Amendment proportionality principle also applies to noncapital sentences. In *Rummel* v. *Estelle*, 445 U. S. 263 (1980), we acknowledged the existence of the proportionality rule for both capital and noncapital cases, *id.*, at 271–274, and n. 11, but we refused to strike down a sentence of life imprisonment, with possibility of parole, for recidivism based on three underlying felonies. In *Hutto* v. *Davis*, 454 U. S. 370, 374, and n. 3 (1982), we recognized the possibility of proportionality review but held it inapplicable to a 40-year prison sentence for possession with intent to distribute nine ounces of marijuana. Our most recent decision discussing the subject is *Solem* v. *Helm*, 463 U. S. 277 (1983). There we held that a sentence of life imprisonment without possibility of parole violated the Eighth Amendment because it was

"grossly disproportionate" to the crime of recidivism based on seven underlying nonviolent felonies. The dissent in *Solem* disagreed with the Court's application of the proportionality principle but observed that in extreme cases it could apply to invalidate a punishment for a term of years. *Id.*, at 280, n. 3. See also *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978) (dicta); *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977) (dicta).

B

Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types. Our most recent pronouncement on the subject in *Solem*, furthermore, appeared to apply a different analysis than in *Rummel* and *Davis*. *Solem* twice stated, however, that its decision was consistent with *Rummel* and thus did not overrule it. *Solem*, *supra*, at 288, n. 13, 303, n. 32. Despite these tensions, close analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review.

The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." *Rummel*, *supra*, at 275–276. Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. "As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements." D. Garland, Punishment and Modern Society 1 (1990). The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. See *Gore* v. *United States*,

357 U. S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy"). Thus, "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, *supra*, at 290. See also *Rummel*, *supra*, at 274 (acknowledging "reluctance to review legislatively mandated terms of imprisonment"); *Weems*, *supra*, at 379 ("The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety").

The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. "The principles which have guided criminal sentencing . . . have varied with the times." *Payne* v. *Tennessee*, *ante*, at 819. The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. Compare *Mistretta* v. *United States*, 488 U. S. 361, 363–366 (1989), with *Williams* v. *New York*, 337 U. S. 241, 248 (1949). And competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic. See *United States* v. *Grayson*, 438 U. S. 41, 45–47 (1978).

Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. See *Solem*, *supra*, at 291, n. 17 ("The inherent nature of our federal system" may result in "a wide range of constitutional sentences"). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991). State sentencing schemes may embody different penological assumptions, making interstate comparison of

sentences a difficult and imperfect enterprise. See *Rummel*, 445 U. S., at 281. See also *Solem*, 463 U. S., at 294–295 (comparison of different terms of years for imprisonment "troubling" but not "unique to this area"). And even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. *Rummel*, 445 U. S., at 281. "[O]ur Constitution 'is made for people of fundamentally differing views.' . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.*, at 282, quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). See also *Graham* v. *West Virginia*, 224 U. S. 616 (1912).

The fourth principle at work in our cases is that proportionality review by federal courts should be informed by "'objective factors to the maximum possible extent.'" *Rummel*, *supra*, at 274–275, quoting *Coker*, 433 U. S., at 592 (plurality opinion). See also *Solem*, *supra*, at 290. The most prominent objective factor is the type of punishment imposed. In *Weems*, "the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system." *Rummel*, 445 U. S., at 275. In a similar fashion, because "'[t]he penalty of death differs from all other forms of criminal punishment,'" *id.*, at 272, quoting *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (opinion of Stewart, J.), the objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence. See *Solem*, *supra*, at 294 ("The easiest comparison [of different sentences] is between capital punishment and noncapital punish-

ment"). By contrast, our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years. *Rummel*, *supra*, at 275. See also *Solem*, 463 U. S., at 294 ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not") (footnote omitted). Although "no penalty is *per se* constitutional," *id.*, at 290, the relative lack of objective standards concerning terms of imprisonment has meant that "'[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.'" *Id.*, at 289–290, quoting *Rummel*, *supra*, at 272.

All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. *Solem*, *supra*, at 288, 303. See also *Weems*, 217 U. S., at 371 (Eighth Amendment prohibits "greatly disproportioned" sentences); *Coker*, *supra*, at 592 (Eighth Amendment prohibits "grossly disproportionate" sentences); *Rummel*, *supra*, at 271 (same).

II

With these considerations stated, it is necessary to examine the challenged aspects of petitioner's sentence: its severe length and its mandatory operation.

A

Petitioner's life sentence without parole is the second most severe penalty permitted by law. It is the same sentence received by the petitioner in *Solem*. Petitioner's crime, however, was far more grave than the crime at issue in *Solem*.

The crime of uttering a no account check at issue in *Solem* was "'one of the most passive felonies a person could commit.'" *Solem*, 463 U. S., at 296 (citation omitted). It "involved neither violence nor threat of violence to any person," and was "viewed by society as among the less serious offenses." *Ibid.* The felonies underlying the defendant's recidivism conviction, moreover, were "all relatively minor." *Id.*, at 296–297. The *Solem* Court contrasted these "minor" offenses with "very serious offenses" such as "a third offense of heroin dealing," and stated that "[n]o one suggests that [a statute providing for life imprisonment without parole] may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." *Id.*, at 299, and n. 26.

Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine. This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses. A. Washton, Cocaine Addiction: Treatment, Recovery, and Relapse Prevention 18 (1989). From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem*. Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 668 (1989). Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, see *post*, at 1022–1023, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.

Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. See Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence

16, 24–36 (N. Weiner & M. Wolfgang eds. 1989). Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence. See generally *id.*, at 16–48. To mention but a few examples, 57 percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. National Institute of Justice, 1989 Drug Use Forecasting Annual Report 9 (June 1990). The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively. *Ibid.* In Detroit, Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. National Institute of Justice, 1988 Drug Use Forecasting Annual Report 4 (Mar. 1990). Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. *Id.*, at 7. And last year an estimated 60 percent of the homicides in Detroit were drug related, primarily cocaine related. U. S. Department of Health and Human Services, Epidemiologic Trends in Drug Abuse 107 (Dec. 1990).

These and other facts and reports detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole. See *United States* v. *Mendenhall*, 446 U. S. 544, 561 (1980) (Powell, J., concurring in part and concurring in judgment) ("Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances"); *Florida* v. *Royer*, 460 U. S. 491, 513 (1983) (BLACKMUN, J., dissenting) (same). See also *Terrebonne* v. *Butler*, 848 F. 2d 500, 504 (CA5 1988) (en banc).

The severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions. In *Hutto* v. *Davis*, 454 U. S. 370 (1982), we upheld against proportionality attack a sentence of 40 years' imprisonment for possession with intent to distribute nine ounces of marijuana. Here, Michigan could with good reason conclude that petitioner's crime is more serious than the crime in *Davis*. Similarly, a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which "no sentence of imprisonment would be disproportionate," *Solem*, 463 U. S., at 290, n. 15. Cf. *Rummel*, 445 U. S., at 296, n. 12 (Powell, J., dissenting) ("A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault").

Petitioner and *amici* contend that our proportionality decisions require a comparative analysis between petitioner's sentence and sentences imposed for other crimes in Michigan and sentences imposed for the same crime in other jurisdictions. Given the serious nature of petitioner's crime, no such comparative analysis is necessary. Although *Solem* considered these comparative factors after analyzing "the gravity of the offense and the harshness of the penalty," 463 U. S., at 290–291, it did not announce a rigid three-part test. In fact, *Solem* stated that in determining unconstitutional disproportionality, "no one factor will be dispositive in a given case." *Id.*, at 291, n. 17. See also *ibid.* ("[N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment").

On the other hand, one factor may be sufficient to determine the constitutionality of a particular sentence. Consistent with its admonition that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," *id.*, at 290, n. 16, *Solem* is best understood as holding that comparative

analysis within and between jurisdictions is not always relevant to proportionality review. The Court stated that "it *may* be helpful to compare sentences imposed on other criminals in the same jurisdiction," and that "courts *may* find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Id.*, at 291–292 (emphasis added). It did not mandate such inquiries.

A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. In *Solem* and *Weems*, decisions in which the Court invalidated sentences as disproportionate, we performed a comparative analysis of sentences after determining that the sentence imposed was grossly excessive punishment for the crime committed. *Solem*, *supra*, at 298–300; *Weems*, 217 U. S., at 377–381. By contrast, *Rummel* and *Davis*, decisions in which the Court upheld sentences against proportionality attacks, did not credit such comparative analyses. In rejecting this form of argument, *Rummel* noted that "[e]ven were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses." *Rummel*, *supra*, at 281.

The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither "eviscerate[s]" *Solem*, nor "abandon[s]" its second and third factors, as the dissent charges, *post*, at 1018, 1020, and it takes full account of *Rummel* and *Davis*, cases ignored by the dissent. In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.

B

Petitioner also attacks his sentence because of its mandatory nature. Petitioner would have us hold that any severe penalty scheme requires individualized sentencing so that a judicial official may consider mitigating circumstances. Our precedents do not support this proposition, and petitioner presents no convincing reason to fashion an exception or adopt a new rule in the case before us. The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in noncapital cases. *Ante*, at 994–996.

The mandatory nature of this sentence comports with our noncapital proportionality decisions as well. The statute at issue in *Solem* made the offender liable to a maximum, not a mandatory, sentence of life imprisonment without parole. *Solem*, 463 U. S., at 281–282, n. 6. Because a "lesser sentence . . . could have been entirely consistent with both the statute and the Eighth Amendment," the Court's decision "d[id] not question the legislature's judgment," but rather challenged the sentencing court's selection of a penalty at the top of the authorized sentencing range. *Id.*, at 299, n. 26. Here, by contrast, the Michigan Legislature has mandated the penalty and has given the state judge no discretion in implementing it. It is beyond question that the legislature "has the power to define criminal punishments without giving the courts any sentencing discretion," *Chapman* v. *United States*, 500 U. S. 453, 467 (1991). Since the beginning of the Republic, Congress and the States have enacted mandatory sentencing schemes. See *Mistretta* v. *United States*, 488 U. S., at 363; *United States* v. *Grayson*, 438 U. S., at 45–46; *Ex parte United States*, 242 U. S. 27 (1916). To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry. We have never invalidated a penalty mandated by a legislature based only on the

length of sentence, and, especially with a crime as severe as this one, we should do so only in the most extreme circumstance. Cf. *Rummel*, 445 U. S., at 274.

In asserting the constitutionality of this mandatory sentence, I offer no judgment on its wisdom. Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum. On the other hand, broad and unreviewed discretion exercised by sentencing judges leads to the perception that no clear standards are being applied, and that the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge. The debate illustrates that, as noted at the outset, arguments for and against particular sentencing schemes are for legislatures to resolve.

Michigan's sentencing scheme establishes graduated punishment for offenses involving varying amounts of mixtures containing controlled substances. Possession of controlled substances in schedule 1 or 2 in an amount less than 50 grams results in a sentence of up to 20 years' imprisonment; possession of more than 50 but less than 225 grams results in a mandatory minimum prison sentence of 10 years with a maximum sentence of 20 years; possession of more than 225 but less than 650 grams results in a mandatory minimum prison sentence of 20 years with a maximum sentence of 30 years; and possession of 650 grams or more results in a mandatory life sentence. Mich. Comp. Laws Ann. §333.7401 (West Supp. 1990–1991). Sentencing courts may depart from the minimum terms specified for all amounts, except those exceeding 650 grams, "if the court finds on the record that there are substantial and compelling reasons to do so." §§333.7401(4), 333.7403(3). This system is not an ancient one revived in a sudden or surprising way; it is, rather, a recent enactment calibrated with care, clarity, and much deliberation to ad-

dress a most serious contemporary social problem. The scheme provides clear notice of the severe consequences that attach to possession of drugs in wholesale amounts, thereby giving force to one of the first purposes of criminal law—deterrence. In this sense, the Michigan scheme may be as fair, if not more so, than other sentencing systems in which the sentencer's discretion or the complexity of the scheme obscures the possible sanction for a crime, resulting in a shock to the offender who learns the severity of his sentence only after he commits the crime.

The Michigan scheme does possess mechanisms for consideration of individual circumstances. Prosecutorial discretion before sentence and executive or legislative clemency afterwards provide means for the State to avert or correct unjust sentences. Here the prosecutor may have chosen to seek the maximum penalty because petitioner possessed 672.5 grams of undiluted cocaine and several other trappings of a drug trafficker, including marijuana cigarettes, four brass cocaine straws, a cocaine spoon, 12 Percodan tablets, 25 tablets of Phendimetrazine Tartrate, a Motorola beeper, plastic bags containing cocaine, a coded address book, and $3,500 in cash.

III

A penalty as severe and unforgiving as the one imposed here would make this a most difficult and troubling case for any judicial officer. Reasonable minds may differ about the efficacy of Michigan's sentencing scheme, and it is far from certain that Michigan's bold experiment will succeed. The accounts of pickpockets at Tyburn hangings are a reminder of the limits of the law's deterrent force, but we cannot say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment. The dangers flowing from drug offenses and the circumstances of the crime committed here demonstrate that the Michigan penalty scheme does not surpass constitutional

bounds. Michigan may use its criminal law to address the issue of drug possession in wholesale amounts in the manner that it has in this sentencing scheme. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). For the foregoing reasons, I conclude that petitioner's sentence of life imprisonment without parole for his crime of possession of more than 650 grams of cocaine does not violate the Eighth Amendment.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." JUSTICE SCALIA concludes that "the Eighth Amendment contains no proportionality guarantee." *Ante*, at 965. Accordingly, he says *Solem* v. *Helm*, 463 U. S. 277 (1983), "was simply wrong" in holding otherwise, as would be the Court's other cases interpreting the Amendment to contain a proportionality principle. JUSTICE KENNEDY, on the other hand, asserts that the Eighth Amendment's proportionality principle is so "narrow," *ante*, at 996, that *Solem*'s analysis should be reduced from three factors to one. With all due respect, I dissent.

The language of the Amendment does not refer to proportionality in so many words, but it does forbid "excessive" fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed. Nor would it be unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment, see *Rummel* v. *Estelle*, 445 U. S. 263, 274, n. 11 (1980), or, more generally, to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted. Thus, Benjamin Oliver, cited by

JUSTICE SCALIA, *ante*, at 981, observed with respect to the Eighth Amendment:

> "No express restriction is laid in the constitution, upon the power of imprisoning for crimes. But, as it is forbidden to demand unreasonable bail, which merely exposes the individual concerned, to imprisonment in case he cannot procure it; as it is forbidden to impose unreasonable fines, on account of the difficulty the person fined would have of paying them, the default of which would be punished by imprisonment only, it would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution. Thus in cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it? In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment must be contrary to the intention of the framers of the constitution." B. Oliver, The Rights of an American Citizen 185–186 (1832).

JUSTICE SCALIA concedes that the language of the Amendment bears such a construction. See *ante*, at 976. His reasons for claiming that it should not be so construed are weak. First, he asserts that if proportionality was an aspect of the restraint, it could have been said more clearly—as plain-talking Americans would have expressed themselves (as for instance, I suppose, in the Fifth Amendment's Due Process Clause or the Fourth Amendment's prohibition against unreasonable searches and seizures).

Second, JUSTICE SCALIA claims that it would be difficult or impossible to label as "unusual" any punishment imposed by the Federal Government, which had just come into existence and had no track record with respect to criminal law. But

the people of the new Nation had been living under the criminal law regimes of the States, and there would have been no lack of benchmarks for determining unusualness. Furthermore, this argument would deprive this part of the Amendment of any meaning at all.

Third, JUSTICE SCALIA argues that all of the available evidence of the day indicated that those who drafted and approved the Amendment "chose . . . not to include within it the guarantee against disproportionate sentences that some State Constitutions contained." *Ante*, at 985. Even if one were to accept the argument that the First Congress did not have in mind the proportionality issue, the evidence would hardly be strong enough to come close to proving an affirmative decision against the proportionality component. Had there been an intention to exclude it from the reach of the words that otherwise could reasonably be construed to include it, perhaps as plain-speaking Americans, the Members of the First Congress would have said so. And who can say with confidence what the members of the state ratifying conventions had in mind when they voted in favor of the Amendment? Surely, subsequent state-court decisions do not answer that question.[1]

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[1] As JUSTICE SCALIA notes, *ante*, at 966, the text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights of 1689. He argues that if the Amendment was intended to adopt whatever meaning the declaration was understood in England to have, the Amendment does not contain a proportionality component because the declaration did not include the proportionality principle. JUSTICE SCALIA labors to demonstrate as much, but concedes that there are scholars who disagree and have the view that the declaration forbade both illegal and disproportionate punishments. *Ante*, at 974–975. One such scholar, after covering much the same ground as does JUSTICE SCALIA, concluded that "[t]he English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties." Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 860

In any event, the Amendment as ratified contained the words "cruel and unusual," and there can be no doubt that prior decisions of this Court have construed these words to include a proportionality principle. In 1910, in the course of holding unconstitutional a sentence imposed by the Philippine courts, the Court stated:

> "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense. *Weems* v. *United States*, 217 U. S. 349, 366–367 (1910).
>
> "[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Id.*, at 371, quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting).

That the punishment imposed in *Weems* was also unknown to Anglo-American tradition—"It has no fellow in American legislation," 217 U. S., at 377—was just another reason to set aside the sentence and did not in the least detract from the holding with respect to proportionality, which, as *Gregg* v. *Georgia*, 428 U. S. 153, 171–172 (1976), observed, was the focus of the Court's holding.

Robinson v. *California*, 370 U. S. 660 (1962), held for the first time that the Eighth Amendment was applicable to punishment imposed by state courts; it also held it to be cruel and unusual to impose even one day of imprisonment for the status of drug addiction, *id.*, at 667. The principal opinion in *Gregg*, *supra*, at 173, observed that the Eighth Amendment's proscription of cruel and unusual punishment is an evolving

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(1969). JUSTICE SCALIA goes on to argue that whatever the declaration meant to Englishmen, the almost identical language of the Eighth Amendment should not be interpreted to forbid excessive punishments. As indicated in the text, I disagree.

concept and announced that punishment would violate the Amendment if it "involve[d] the unnecessary and wanton infliction of pain" or if it was "grossly out of proportion to the severity of the crime." Under this test, the death penalty was not cruel and unusual in all cases. Following *Gregg*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977), held that the Amendment bars not only a barbaric punishment but also a punishment that is excessive, *i. e.*, a punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." We went on to hold that the punishment of death for the crime of rape was unconstitutional for lack of proportionality. *Ibid.* Similarly, in *Enmund* v. *Florida*, 458 U. S. 782 (1982), we invalidated a death sentence for felony murder, on disproportionality grounds, where there had been no proof of an intent to murder. Finally, *Solem* v. *Helm*, 463 U. S. 277 (1983), invalidated a prison sentence on the ground that it was too severe in relation to the crime that had been committed.

Not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible. Indeed, *Rummel* v. *Estelle*, 445 U. S. 263 (1980), the holding of which JUSTICE SCALIA does not question, itself recognized that the Eighth Amendment contains a proportionality requirement, for it did not question *Coker* and indicated that the proportionality principle would come into play in some extreme, nonfelony cases. *Id.*, at 272, 274, and n. 11.

If JUSTICE SCALIA really means what he says—"the Eighth Amendment contains no proportionality guarantee," *ante*, at 965, it is difficult to see how any of the above holdings and declarations about the proportionality requirement of the Amendment could survive. Later in his opinion, however, *ante*, at 994, JUSTICE SCALIA backtracks and appears to ac-

cept that the Amendment does indeed insist on proportional punishments in a particular class of cases, those that involve sentences of death. His fallback position is that outside the capital cases, proportionality review is not required by the Amendment. With the exception of capital cases, the severity of the sentence for any crime is a matter that the Amendment leaves to the discretion of legislators. Any prison sentence, however severe, for any crime, however petty, will be beyond review under the Eighth Amendment. This position restricts the reach of the Eighth Amendment far more than did *Rummel*. It also ignores the generality of the Court's several pronouncements about the Eighth Amendment's proportionality component. And it fails to explain why the words "cruel and unusual" include a proportionality requirement in some cases but not in others. Surely, it is no explanation to say only that such a requirement in death penalty cases is part of our capital punishment jurisprudence. That is true, but the decisions requiring proportionality do so because of the Eighth Amendment's prohibition against cruel and unusual punishments. The Court's capital punishment cases requiring proportionality reject JUSTICE SCALIA's notion that the Amendment bars only cruel and unusual modes or methods of punishment. Under that view, capital punishment—a mode of punishment—would either be completely barred or left to the discretion of the legislature. Yet neither is true. The death penalty is appropriate in some cases and not in others. The same should be true of punishment by imprisonment.

What is more, the Court's jurisprudence concerning the scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis. See *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion); *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 264, n. 4 (1989). Thus, "this Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were

generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" *Stanford* v. *Kentucky*, 492 U. S. 361, 369 (1989), quoting *Gregg* v. *Georgia*, 428 U. S., at 171 (opinion of Stewart, Powell, and STEVENS, JJ.). In so doing, the Court has borne in mind Justice McKenna's admonition in *Weems* v. *United States*, 217 U. S., at 373, that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." See also *Browning-Ferris*, *supra*, at 273 (quoting *Weems*).

The Court therefore has recognized that a punishment may violate the Eighth Amendment if it is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop*, *supra*, at 101. See *Stanford*, *supra*, at 369 (quoting *Trop*). In evaluating a punishment under this test, "we have looked not to our own conceptions of decency, but to those of modern American society as a whole" in determining what standards have "evolved," *Stanford*, *supra*, at 369, and thus have focused not on "the subjective views of individual Justices," but on "objective factors to the maximum possible extent," *Coker*, *supra*, at 592 (plurality opinion). It is this type of objective factor which forms the basis for the tripartite proportionality analysis set forth in *Solem*.

Contrary to JUSTICE SCALIA's suggestion, *ante*, at 985–986, the *Solem* analysis has worked well in practice. Courts appear to have had little difficulty applying the analysis to a given sentence, and application of the test by numerous state and federal appellate courts has resulted in a mere handful of sentences being declared unconstitutional.[2] Thus, it is clear

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[2] Indeed, the parties have cited only four cases decided in the years since *Solem* in which sentences have been reversed on the basis of a proportionality analysis. See *Clowers* v. *State*, 522 So. 2d 762 (Miss. 1988) (holding that trial court had discretion to reduce a mandatory sentence of 15 years without parole under a recidivist statute for a defendant who ut-

that reviewing courts have not baldly substituted their own subjective moral values for those of the legislature. Instead, courts have demonstrated that they are "capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."[3] *Rummel*, 445 U. S., at 306 (Powell, J., dissenting). *Solem* is wholly consistent with this approach, and when properly applied, its analysis affords "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals," 463 U. S., at 290 (footnote omitted), and will only rarely result in a sentence failing constitutional muster. The fact that this is one of those rare instances is no reason to abandon the analysis.

Nor does the fact that this case involves judicial review of a legislatively mandated sentence, rather than a sentence imposed in the exercise of judicial discretion, warrant abandonment of *Solem*. First, the quote from *Solem* in the preceding paragraph makes clear that the analysis is intended to apply to both types of sentences. Second, contrary to JUSTICE SCALIA's suggestion, *ante*, at 976, the fact that a punish-

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tered a forged check); *Ashley* v. *State*, 538 So. 2d 1181 (Miss. 1989) (reaching a similar result for a defendant who burgled a home to get $4 to pay a grocer for food eaten in the store); *State* v. *Gilham*, 48 Ohio App. 3d 293, 549 N. E. 2d 555 (1988). In addition, in *Naovarath* v. *State*, 105 Nev. 525, 779 P. 2d 944 (1989), the court relied on both State and Federal Constitutions to strike a sentence of life without parole imposed on an adolescent who killed and then robbed an individual who had repeatedly molested him.

[3] Nor are appellate courts forced to expend undue resources to evaluate prison sentences under *Solem*. In each case cited by respondent in which an appellate court had to review a sentence under *Solem*, the court quickly disposed of the constitutional challenge. See *United States* v. *Sullivan*, 895 F. 2d 1030, 1031–1032 (CA5), cert. denied, 498 U. S. 877 (1990); *United States* v. *Benefield*, 889 F. 2d 1061, 1063–1065 (CA11 1989); *United States* v. *Savage*, 888 F. 2d 528 (CA7 1989), cert. denied, 495 U. S. 959 (1990); *State* v. *Elbert*, 125 N. H. 1, 15–16, 480 A. 2d 854, 862 (1984) (Souter, J.).

ment has been legislatively mandated does not automatically render it "legal" or "usual" in the constitutional sense. Indeed, as noted above, if this were the case, then the prohibition against cruel and unusual punishments would be devoid of any meaning. He asserts that when "[w]renched out of its common-law context, and applied to the actions of a legislature, the word 'unusual' could hardly mean 'contrary to law,'" because "[t]here were no common-law punishments in the federal system." *Ante*, at 975, 976. But if this is so, then neither could the term "unusual" mean "contrary to custom," for until Congress passed the first penal law, there were no "customary" federal punishments either. Moreover, the suggestion that a legislatively mandated punishment is necessarily "legal" is the antithesis of the principles established in *Marbury* v. *Madison*, 1 Cranch 137 (1803), for "[i]t is emphatically the province and duty of the judicial department to say what the law is," *id.*, at 177, and to determine whether a legislative enactment is consistent with the Constitution. This Court's decision in *Robinson* v. *California*, 370 U. S. 660 (1962), in which the prohibition against cruel and unusual punishments was made applicable to the States through the Fourteenth Amendment, removed any doubt that it is as much our duty to assess the constitutionality of punishments enacted by state legislative bodies as it is our obligation to review congressional enactments. Indeed, the Court's prior decisions have recognized that legislatively mandated sentences may violate the Eighth Amendment. See *Rummel*, *supra*, at 274, n. 11; *Hutto* v. *Davis*, 454 U. S. 370, 374, n. 3 (1982). This Court has long scrutinized legislative enactments concerning punishment without fear that it was unduly invading the legislative prerogative of the States. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Enmund* v. *Florida*, 458 U. S. 782 (1982). That such scrutiny requires sensitivity to federalism concerns and involves analysis that may at times be difficult affords no justification for this

Court's abrogation of its responsibility to uphold constitutional principles.

Two dangers lurk in JUSTICE SCALIA's analysis. First, he provides no mechanism for addressing a situation such as that proposed in *Rummel*, in which a legislature makes overtime parking a felony punishable by life imprisonment. He concedes that "one can imagine extreme examples"—perhaps such as the one described in *Rummel*—"that no rational person, in no time or place, could accept," but attempts to offer reassurance by claiming that "for the same reason these examples are easy to decide, they are certain never to occur." *Ante*, at 985–986. This is cold comfort indeed, for absent a proportionality guarantee, there would be no basis for deciding such cases should they arise.

Second, as I have indicated, JUSTICE SCALIA's position that the Eighth Amendment addresses only modes or methods of punishment is quite inconsistent with our capital punishment cases, which do not outlaw death as a mode or method of punishment, but instead put limits on its application. If the concept of proportionality is downgraded in the Eighth Amendment calculus, much of this Court's capital penalty jurisprudence will rest on quicksand.

While JUSTICE SCALIA seeks to deliver a swift death sentence to *Solem*, JUSTICE KENNEDY prefers to eviscerate it, leaving only an empty shell. The analysis JUSTICE KENNEDY proffers is contradicted by the language of *Solem* itself and by our other cases interpreting the Eighth Amendment.

In *Solem*, the Court identified three major factors to consider in assessing whether a punishment violates the Eighth Amendment: "the gravity of the offense and the harshness of the penalty," 463 U. S., at 290–291; "the sentences imposed on other criminals in the same jurisdiction," *id.*, at 291; and "the sentences imposed for commission of the same crime in other jurisdictions," *id.*, at 291–292. JUSTICE KENNEDY, however, maintains that "one factor may be sufficient to determine the constitutionality of a particular sentence," and

that there is no need to consider the second and third factors unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Ante*, at 1004, 1005. *Solem* is directly to the contrary, for there the Court made clear that "no one factor will be dispositive in a given case," and "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment," "[b]ut a combination of objective factors can make such analysis possible." 463 U. S., at 291, n. 17.

Moreover, as JUSTICE KENNEDY concedes, see *ante*, at 1005, the use of an intrajurisdictional and interjurisdictional comparison of punishments and crimes has long been an integral part of our Eighth Amendment jurisprudence. Numerous cases have recognized that a proper proportionality analysis must include the consideration of such objective factors as "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made." *Enmund*, *supra*, at 788. See also *Stanford*, 492 U. S., at 369–371; *McCleskey* v. *Kemp*, 481 U. S. 279, 300 (1987).

Thus, in *Weems*, 217 U. S., at 380–381, the Court noted the great disparity between the crime at issue and those within the same jurisdiction for which less severe punishments were imposed. In *Trop*, 356 U. S., at 102–103, the Court surveyed international law before determining that forfeiture of citizenship as a punishment for wartime desertion violated the Eighth Amendment. In *Coker* v. *Georgia*, *supra*, we sought "guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman," *id.*, at 593 (plurality opinion), and surveyed the laws of the States before concluding that "[t]he current judgment with respect to the death penalty for rape," though "not wholly unanimous among state legislatures, . . . weigh[ed] very heavily on the side of rejecting capital punishment as a

suitable penalty," *id.*, at 596 (plurality opinion). And in *Enmund*, we again reviewed the laws of the States before concluding that the death penalty is unconstitutional when inflicted upon one who merely participates in a felony during which a murder occurs. 458 U. S., at 797. That in some of these cases the comparisons were made after the Court had considered the severity of the crime in no way suggests that this part of the analysis was any less essential to an assessment of a given punishment's proportionality.

JUSTICE KENNEDY's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile. The first prong of *Solem* requires a court to consider two discrete factors—the gravity of the offense and the severity of the punishment. A court is not expected to consider the interaction of these two elements and determine whether "the sentence imposed was grossly excessive punishment for the crime committed." See *ante*, at 1005. Were a court to attempt such an assessment, it would have no basis for its determination that a sentence was—or was not—disproportionate, other than the "subjective views of individual [judges]," *Coker*, *supra*, at 592 (plurality opinion), which is the very sort of analysis our Eighth Amendment jurisprudence has shunned. JUSTICE KENNEDY asserts that "our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years," citing *Rummel* and *Solem* as support. *Ante*, at 1001. But *Solem* recognized that

> "[f]or sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar

lines in a variety of contexts." 463 U. S., at 294 (footnote omitted).

The Court compared line-drawing in the Eighth Amendment context to that regarding the Sixth Amendment right to a speedy trial and right to a jury before concluding that "courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn." *Id.*, at 295. Indeed, only when a comparison is made with penalties for other crimes and in other jurisdictions can a court begin to make an objective assessment about a given sentence's constitutional proportionality, giving due deference to "public attitudes concerning a particular sentence." *Coker*, 433 U. S., at 592 (plurality opinion).

Because there is no justification for overruling or limiting *Solem*, it remains to apply that case's proportionality analysis to the sentence imposed on petitioner. Application of the *Solem* factors to the statutorily mandated punishment at issue here reveals that the punishment fails muster under *Solem* and, consequently, under the Eighth Amendment to the Constitution.

Petitioner, a first-time offender, was convicted of possession of 672 grams of cocaine. The statute under which he was convicted, Mich. Comp. Laws Ann. § 333.7403(2)(a)(i) (West Supp. 1990–1991), provides that a person who knowingly or intentionally possesses any of various narcotics, including cocaine, "[w]hich is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life." No particular degree of drug purity is required for a conviction. Other statutes make clear that an individual convicted of possessing this quantity of drugs is not eligible for parole. See §§ 791.233b [1](b), 791.234(4). A related statute, § 333.7401(2)(a)(i), which was enacted at the same time as the statute under which petitioner was convicted, mandates the same penalty of life imprisonment without possibility of parole for someone who "manufacture[s], deliver[s], or possess[es] with intent

to manufacture or deliver" 650 grams or more of a narcotic mixture.[4] There is no room for judicial discretion in the imposition of the life sentence upon conviction. The asserted purpose of the legislative enactment of these statutes was to "'stem drug traffic'" and reach "'drug dealers.'" See Brief for Respondent 7, quoting House Legislative Analysis of Mich. House Bill 4190 of 1977 (May 17, 1978).

The first *Solem* factor requires a reviewing court to assess the gravity of the offense and the harshness of the penalty. 463 U. S., at 292. The mandatory sentence of life imprisonment without possibility of parole "is the most severe punishment that the State could have imposed on any criminal for any crime," *id.*, at 297, for Michigan has no death penalty.

Although these factors are "by no means exhaustive," *id.*, at 294, in evaluating the gravity of the offense, it is appropriate to consider "the harm caused or threatened to the victim or society," based on such things as the degree of violence involved in the crime and "[t]he absolute magnitude of the crime," and "the culpability of the offender," including the degree of requisite intent and the offender's motive in committing the crime, *id.*, at 292–293.

Drugs are without doubt a serious societal problem. To justify such a harsh mandatory penalty as that imposed here, however, the offense should be one which will *always* warrant that punishment. Mere possession of drugs—even in such a large quantity—is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole. Unlike crimes directed against the persons and property of others, possession of drugs affects the criminal who uses the drugs most directly. The ripple effect on society caused by possession of drugs, through related crimes, lost productivity, health problems, and the like,

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[4] The two statutes also set forth penalties for those convicted based on lesser quantities of drugs. They provide for parallel penalties for all amounts greater than 50 grams, but below that point the penalties under the two statutes diverge.

is often not the direct consequence of possession, but of the resulting addiction, something which this Court held in *Robinson* v. *California*, 370 U. S., at 660–667, cannot be made a crime.

To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt. See *Enmund* v. *Florida*, 458 U. S., at 801. JUSTICE KENNEDY attempts to justify the harsh mandatory sentence imposed on petitioner by focusing on the subsidiary effects of drug use, and thereby ignores this aspect of our Eighth Amendment jurisprudence. While the collateral consequences of drugs such as cocaine are indisputably severe, they are not unlike those which flow from the misuse of other, legal substances. For example, in considering the effects of alcohol on society, the Court has stressed that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it," *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990), but at the same time has recognized that the severity of the problem "cannot excuse the need for scrupulous adherence to our constitutional principles," *Grady* v. *Corbin*, 495 U. S. 508, 524 (1990). Thus, the Court has held that a drunken driver who has been prosecuted for traffic offenses arising from an accident cannot, consistent with the Double Jeopardy Clause, subsequently be prosecuted for the death of the accident victim. *Ibid.* Likewise, the Court scrutinized closely a state program of vehicle checkpoints designed to detect drunken drivers before holding that the brief intrusion upon motorists is consistent with the Fourth Amendment. *Sitz*, *supra*, at 451. It is one thing to uphold a checkpoint designed to detect drivers then under the influence of a drug that creates a present risk that they will harm others. It is quite something else to uphold petitioner's sentence because of the collateral consequences which might issue, however indirectly, from the drugs he possessed. Indeed, it is inconceivable that a State could rationally choose to penalize one

who possesses large quantities of alcohol in a manner similar to that in which Michigan has chosen to punish petitioner for cocaine possession, because of the tangential effects which might ultimately be traced to the alcohol at issue. "Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct." *Turner* v. *United States*, 396 U. S. 398, 427 (1970) (Black, J., dissenting). That is precisely the course JUSTICE KENNEDY advocates here.

The "absolute magnitude" of petitioner's crime is not exceptionally serious. Because possession is necessarily a lesser included offense of possession with intent to distribute, it is odd to punish the former as severely as the latter. Cf. *Solem*, *supra*, at 293. Nor is the requisite intent for the crime sufficient to render it particularly grave. To convict someone under the possession statute, it is only necessary to prove that the defendant knowingly possessed a mixture containing narcotics which weighs at least 650 grams. There is no *mens rea* requirement of intent to distribute the drugs, as there is in the parallel statute. Indeed, the presence of a separate statute which reaches manufacture, delivery, or possession with intent to do either undermines the State's position that the purpose of the *possession* statute was to reach drug dealers.[5] Although "[i]ntent to deliver can be inferred from the amount of a controlled substance possessed by the

[5] The Court of Appeals for the Sixth Circuit has applied the *Solem* factors to uphold the mandatory life sentence imposed by the Michigan statute concerning possession with intent to deliver 650 or more grams of narcotics. See *Young* v. *Miller*, 883 F. 2d 1276 (1989), cert. pending, No. 89–6960. In so doing, the court recognized that the sentence was particularly harsh, especially in light of the lack of opportunity for the exercise of judicial discretion, but found that it was not so disproportionate to other sentences for drug *trafficking* as to violate the Eighth Amendment. *Id.*, at 1284–1285. Because the statute at issue here concerns only drug *possession*, the Sixth Circuit's analysis has little relevance.

accused," *People* v. *Abrego*, 72 Mich. App. 176, 181, 249 N. W. 2d 345, 347 (1976), the inference is one to be drawn by the jury, see *People* v. *Kirchoff*, 74 Mich. App. 641, 647–649, 254 N. W. 2d 793, 796–797 (1977). In addition, while there is usually a pecuniary motive when someone possesses a drug with intent to deliver it, such a motive need not exist in the case of mere possession. Cf. *Solem*, 463 U. S., at 293–294. Finally, this statute applies equally to first-time offenders, such as petitioner, and recidivists. Consequently, the particular concerns reflected in recidivist statutes such as those in *Rummel* and *Solem* are not at issue here.

There is an additional concern present here. The State has conceded that it chose not to prosecute Harmelin under the statute prohibiting possession with intent to deliver, because it was "not necessary and not prudent to make it more difficult for us to win a prosecution." Tr. of Oral Arg. 30–31. The State thus aimed to avoid having to establish Harmelin's intent to distribute by prosecuting him instead under the possession statute.[6] Because the statutory punishment for the two crimes is the same, the State succeeded in punishing Harmelin as if he had been convicted of the more serious crime without being put to the test of proving his guilt on those charges.

The second prong of the *Solem* analysis is an examination of "the sentences imposed on other criminals in the same jurisdiction." 463 U. S., at 292. As noted above, there is no death penalty in Michigan; consequently, life without parole,

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[6] Both the State and JUSTICE KENNEDY, see *ante*, at 1008, point to the fact that the amount and purity of the drugs and Harmelin's possession of a beeper, coded phone book, and gun all were noted in the presentence report and provided circumstantial evidence of an intent to distribute. None of this information, however, was relevant to a prosecution under the possession statute. Indeed, because the sentence is statutorily mandated for mere possession, there was no reason for defense counsel to challenge the presence of this information in the presentence report. See Tr. of Oral Arg. 10. It would likewise be inappropriate to consider petitioner's characteristics in assessing the constitutionality of the penalty.

the punishment mandated here, is the harshest penalty available. It is reserved for three crimes: first-degree murder, see Mich. Comp. Laws Ann. § 750.316 (West 1991); manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics; and possession of 650 grams or more of narcotics. Crimes directed against the persons and property of others—such as second-degree murder, § 750.317; rape, § 750.520b; and armed robbery, § 750.529—do not carry such a harsh mandatory sentence, although they do provide for the possibility of a life sentence in the exercise of judicial discretion. It is clear that petitioner "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes." 463 U. S., at 299.

The third factor set forth in *Solem* examines "the sentences imposed for commission of the same crime in other jurisdictions." *Id.*, at 291–292. No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here. Of the remaining 49 States, only Alabama provides for a mandatory sentence of life imprisonment without possibility of parole for a first-time drug offender, and then only when a defendant possesses *10 kilograms* or more of cocaine. Ala. Code § 13A–12–231(2)(d) (Supp. 1990). Possession of the amount of cocaine at issue here would subject an Alabama defendant to a mandatory minimum sentence of only five years in prison. § 13A–12–231(2)(b).[7] Even under the Federal Sentencing Guidelines, with all relevant enhancements, petitioner's sentence would barely exceed 10 years. See United States Sentencing Com-

[7] The Alabama statute is entitled "Trafficking in cannabis, cocaine, etc.," and punishes "[a]ny person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" specified amounts of various drugs. See Ala. Code §13A–12–231(1) (Supp. 1990). The mandatory minimum sentences vary depending on the particular drug involved and the amount of the drug at issue.

mission Guidelines Manual §2D1.1 (1990). Thus, "[i]t appears that [petitioner] was treated more severely than he would have been in any other State." *Solem, supra*, at 300. Indeed, the fact that no other jurisdiction provides such a severe, mandatory penalty for possession of this quantity of drugs is enough to establish "the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." *Stanford*, 492 U. S., at 371. Cf. *Coker*, 433 U. S., at 596; *Ford* v. *Wainwright*, 477 U. S. 399, 408 (1986).

Application of *Solem*'s proportionality analysis leaves no doubt that the Michigan statute at issue fails constitutional muster.[8] The statutorily mandated penalty of life without possibility of parole for possession of narcotics is unconstitutionally disproportionate in that it violates the Eighth Amendment's prohibition against cruel and unusual punishment. Consequently, I would reverse the decision of the Michigan Court of Appeals.

JUSTICE MARSHALL, dissenting.

I agree with JUSTICE WHITE's dissenting opinion, except insofar as it asserts that the Eighth Amendment's Cruel and Unusual Punishments Clause does not proscribe the death penalty. I adhere to my view that capital punishment is in all instances unconstitutional. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I also believe that, "[b]ecause of the uniqueness of the death penalty," *id.*, at 188 (opinion of Stewart, Powell, and STEVENS, JJ.), the Eighth Amendment requires comparative proportionality review of capital sentences. See *Turner* v. *California*, 498 U. S. 1053, 1054 (1991) (MARSHALL, J., dissenting from denial of certiorari). However, my view that capital punish-

[8] Because the statute under which petitioner was convicted is unconstitutional under *Solem*, there is no need to reach his remaining argument that imposition of a life sentence without the possibility of parole necessitates the sort of individualized sentencing determination heretofore reserved for defendants subject to the death penalty.

ment is especially proscribed and, where not proscribed, especially restricted by the Eighth Amendment is not inconsistent with JUSTICE WHITE's central conclusion, *ante*, at 1012–1015, that the Eighth Amendment also imposes a general proportionality requirement. As JUSTICE WHITE notes, this Court has recognized and applied that requirement in both capital and noncapital cases, and had it done so properly here it would have concluded that Michigan's law mandating life sentences with no possibility of parole even for first-time drug possession offenders is unconstitutional.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

While I agree wholeheartedly with JUSTICE WHITE's dissenting opinion, I believe an additional comment is appropriate.

The severity of the sentence that Michigan has mandated for the crime of possession of more than 650 grams of cocaine, whether diluted or undiluted, does not place the sentence in the same category as capital punishment. I remain convinced that Justice Stewart correctly characterized the penalty of death as "unique" because of "its absolute renunciation of all that is embodied in our concept of humanity." *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). Nevertheless, a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." *Id.*, at 307. Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible.

The death sentences that were at issue and invalidated in *Furman* were "cruel and unusual in the same way that being

struck by lightning is cruel and unusual." *Id.*, at 309. In my opinion the imposition of a life sentence without possibility of parole on this petitioner is equally capricious. As JUSTICE WHITE has pointed out, under the Federal Sentencing Guidelines, with all relevant enhancements, petitioner's sentence would barely exceed 10 years. *Ante*, at 1026–1027. In most States, the period of incarceration for a first offender like petitioner would be substantially shorter. No jurisdiction except Michigan has concluded that the offense belongs in a category where reform and rehabilitation are considered totally unattainable. Accordingly, the notion that this sentence satisfies any meaningful requirement of proportionality is itself both cruel and unusual.

I respectfully dissent.

GENTILE *v.* STATE BAR OF NEVADA

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 89–1836. Argued April 15, 1991—Decided June 27, 1991

Petitioner Gentile, an attorney, held a press conference the day after his client, Sanders, was indicted on criminal charges under Nevada law. Six months later, a jury acquitted Sanders. Subsequently, respondent State Bar of Nevada filed a complaint against Gentile, alleging that statements he made during the press conference violated Nevada Supreme Court Rule 177, which prohibits a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding, 177(1), which lists a number of statements that are "ordinarily . . . likely" to result in material prejudice, 177(2), and which provides that a lawyer "may state without elaboration . . . the general nature of the . . . defense" "[n]otwithstanding subsection 1 and 2 (a–f)," 177(3). The Disciplinary Board found that Gentile violated the Rule and recommended that he be privately reprimanded. The State Supreme Court affirmed, rejecting his contention that the Rule violated his right to free speech.

Held: The judgment is reversed.

106 Nev. 60, 787 P. 2d 386, reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts III and VI, concluding that, as interpreted by the Nevada Supreme Court, Rule 177 is void for vagueness. Its safe harbor provision, Rule 177(3), misled Gentile into thinking that he could give his press conference without fear of discipline. Given the Rule's grammatical structure and the absence of a clarifying interpretation by the state court, the Rule fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility. By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general" nature of the defense without "elaboration" need fear no discipline even if he knows or reasonably should know that his statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Both "general" and "elaboration" are classic terms of degree which, in this context, have no settled usage or tradition of interpretation in law, and thus a lawyer has no principle for determining when his remarks pass from the permissible to the forbidden. A review of the press conference—where Gentile made only a brief opening statement and declined to answer reporters'

questions seeking more detailed comments—supports his claim that he thought his statements were protected. That he was found in violation of the Rules after studying them and making a conscious effort at compliance shows that Rule 177 creates a trap for the wary as well as the unwary. Pp. 1048–1051.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the "substantial likelihood of material prejudice" test applied by Nevada and most other States satisfies the First Amendment. Pp. 1065–1076.

(a) The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or imminent threat standard established for regulation of the press during pending proceedings. See, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539. A lawyer's right to free speech is extremely circumscribed in the courtroom, see, *e. g.*, *Sacher* v. *United States*, 343 U. S. 1, 8, and, in a pending case, is limited outside the courtroom as well, see, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333, 363. Cf. *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20. Moreover, this Court's decisions dealing with a lawyer's First Amendment right to solicit business and advertise have not suggested that lawyers are protected to the same extent as those engaged in other businesses, but have balanced the State's interest in regulating a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350. Pp. 1065–1075.

(b) The "substantial likelihood of material prejudice" standard is a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials. Lawyers in such cases are key participants in the criminal justice system, and the State may demand some adherence to that system's precepts in regulating their speech and conduct. Their extrajudicial statements pose a threat to a pending proceeding's fairness, since they have special access to information through discovery and client communication, and since their statements are likely to be received as especially authoritative. The standard is designed to protect the integrity and fairness of a State's judicial system and imposes only narrow and necessary limitations on lawyers' speech. Those limitations are aimed at comments that are likely to influence a trial's outcome or prejudice the jury venire, even if an untainted panel is ultimately found. Few interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and the State has a substantial interest in preventing officers of the court from imposing costs on the judicial system and litigants arising from measures, such as a change of venue, to ensure

a fair trial. The restraint on speech is narrowly tailored to achieve these objectives, since it applies only to speech that is substantially likely to have a materially prejudicial effect, is neutral to points of view, and merely postpones the lawyer's comments until after the trial. Pp. 1075–1076.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, in which MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Parts I, II, IV, and V, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C. J., delivered the opinion of the Court with respect to Parts I and II, in which WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined, and a dissenting opinion with respect to Part III, in which WHITE, SCALIA, and SOUTER, JJ., joined, *post*, p. 1062. O'CONNOR, J., filed a concurring opinion, *post*, p. 1081.

Michael E. Tigar argued the cause for petitioner. With him on the briefs were *Samuel J. Buffone*, *Terrance G. Reed*, and *Neil G. Galatz*.

Robert H. Klonoff argued the cause for respondent. With him on the brief were *Donald B. Ayer* and *John E. Howe*.*

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III and VI, and an opinion with respect to Parts I, II, IV, and V, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Leon Friedman*, *Steven R. Shapiro*, *John A. Powell*, and *Elliot Mincberg*; and for the American Newspaper Publishers Association et al. by *Alice Neff Lucan*, *Harold W. Fuson, Jr.*, *Jane E. Kirtley*, *David M. Olive*, *Deborah R. Linfield*, *W. Terry Maguire*, *René P. Milam*, *Bruce W. Sanford*, *J. Laurent Scharff*, *Richard M. Schmidt, Jr.*, and *Barbara Wartelle Wall*.

Solicitor General Starr, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Stephen J. Marzen* filed a brief for the United States as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *John J. Curtin, Jr.*, and *George A. Kuhlman*; for the National Association of Criminal Defense Lawyers by *William J. Genego*; and for Nevada Attorneys for Criminal Justice by *Kevin M. Kelly*.

Hours after his client was indicted on criminal charges, petitioner Gentile, who is a member of the Bar of the State of Nevada, held a press conference. He made a prepared statement, which we set forth in Appendix A to this opinion, and then he responded to questions. We refer to most of those questions and responses in the course of our opinion.

Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts. The State Bar of Nevada then filed a complaint against petitioner, alleging a violation of Nevada Supreme Court Rule 177, a rule governing pretrial publicity almost identical to ABA Model Rule of Professional Conduct 3.6. We set forth the full text of Rule 177 in Appendix B. Rule 177(1) prohibits an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 177(2) lists a number of statements that are "ordinarily . . . likely" to result in material prejudice. Rule 177(3) provides a safe harbor for the attorney, listing a number of statements that can be made without fear of discipline notwithstanding the other parts of the Rule.

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar found that Gentile had made the statements in question and concluded that he violated Rule 177. The board recommended a private reprimand. Petitioner appealed to the Nevada Supreme Court, waiving the confidentiality of the disciplinary proceeding, and the Nevada court affirmed the decision of the board.

Nevada's application of Rule 177 in this case violates the First Amendment. Petitioner spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws. Furthermore, the Rule's safe harbor provision, Rule 177(3), appears

to permit the speech in question, and Nevada's decision to discipline petitioner in spite of that provision raises concerns of vagueness and selective enforcement.

I

The matter before us does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding," but is limited to Nevada's interpretation of that standard. On the other hand, one central point must dominate the analysis: this case involves classic political speech. The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client's defense, that the State sought the indictment and conviction of an innocent man as a "scapegoat" and had not "been honest enough to indict the people who did it; the police department, crooked cops." See *infra*, Appendix A. At issue here is the constitutionality of a ban on political speech critical of the government and its officials.

A

Unlike other First Amendment cases this Term in which speech is not the direct target of the regulation or statute in question, see, *e. g.*, *Barnes* v. *Glen Theatre, Inc.*, *ante*, p. 560 (ban on nude barroom dancing); *Leathers* v. *Medlock*, 499 U. S. 439 (1991) (sales tax on cable and satellite television), this case involves punishment of pure speech in the political forum. Petitioner engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some of our colleagues would discern a standard of diminished First Amendment protection. His words were directed at public officials and their conduct in office.

There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of informa-

tion relating to alleged governmental misconduct, which only last Term we described as "speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth* v. *Smith*, 494 U. S. 624, 632 (1990).

The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See, *e. g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 838–839 (1978). "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 575 (1980). Public vigilance serves us well, for "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U. S. 257, 270–271 (1948). As we said in *Bridges* v. *California*, 314 U. S. 252 (1941), limits upon public comment about pending cases are

> "likely to fall not only at a crucial time but upon the most important topics of discussion. . . .
>
> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Id.*, at 268–269.

In *Sheppard* v. *Maxwell*, 384 U. S. 333, 350 (1966), we reminded that "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, see *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 606 (1976) (Brennan, J., concurring in judgment) ("[C]ommen-

tary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern"), or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process, see *Morrison* v. *Olson*, 487 U. S. 654, 727–728 (1988) (SCALIA, J., dissenting). The public has an interest in its responsible exercise.

B

We are not called upon to determine the constitutionality of the ABA Model Rule of Professional Conduct 3.6 (1981), but only Rule 177 as it has been interpreted and applied by the State of Nevada. Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm. A rule governing speech, even speech entitled to full constitutional protection, need not use the words "clear and present danger" in order to pass constitutional muster.

> "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.' *Pennekamp* v. *Florida*, 328 U. S. 331, 353 (1946) (Frankfurter, J., concurring). Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed." *Landmark Communications, Inc.* v. *Virginia*, *supra*, at 842–843.

The drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the clear and present danger test. See ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality"; citing *Landmark Communications*, *supra*, at 844; *Wood* v. *Georgia*, 370 U. S. 375 (1962); and *Bridges* v. *California*, *supra*, at 273, for guidance in determining whether statement "poses a sufficiently serious and imminent threat to the fair administration of justice"); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 397 (1985) ("To use traditional terminology, the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)"); *In re Hinds*, 90 N. J. 604, 622, 449 A. 2d 483, 493 (1982) (substantial likelihood of material prejudice standard is a linguistic equivalent of clear and present danger).

The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application. Under those principles, nothing inherent in Nevada's formulation fails First Amendment review; but as this case demonstrates, Rule 177 has not been interpreted in conformance with those principles by the Nevada Supreme Court.

II

Even if one were to accept respondent's argument that lawyers participating in judicial proceedings may be subjected, consistent with the First Amendment, to speech restrictions that could not be imposed on the press or general public, the judgment should not be upheld. The record does

not support the conclusion that petitioner knew or reasonably should have known his remarks created a substantial likelihood of material prejudice, if the Rule's terms are given any meaningful content.

We have held that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–286 (1964)).

Neither the disciplinary board nor the reviewing court explains any sense in which petitioner's statements had a substantial likelihood of causing material prejudice. The only evidence against Gentile was the videotape of his statements and his own testimony at the disciplinary hearing. The Bar's whole case rests on the fact of the statements, the time they were made, and petitioner's own justifications. Full deference to these factual findings does not justify abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards.

Rather, this Court is

> "compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946).
>
> "'Whenever the fundamental rights of free speech . . . are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually

> did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.'" *Landmark Communications, Inc.* v. *Virginia*, 435 U. S., at 844 (quoting *Whitney* v. *California*, 274 U. S. 357, 378–379 (1927) (Brandeis, J., concurring)).

Whether one applies the standard set out in *Landmark Communications* or the lower standard our colleagues find permissible, an examination of the record reveals no basis for the Nevada court's conclusion that the speech presented a substantial likelihood of material prejudice.

Our decision earlier this Term in *Mu'Min* v. *Virginia*, 500 U. S. 415 (1991), provides a pointed contrast to respondent's contention in this case. There, the community had been subjected to a barrage of publicity prior to Mu'Min's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on Mu'Min's jury admitted some exposure to pretrial publicity. We held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In light of that holding, the Nevada court's conclusion that petitioner's abbreviated, general comments six months before trial created a "substantial likelihood of materially prejudicing" the proceeding is, to say the least, most unconvincing.

A

Pre-Indictment Publicity. On January 31, 1987, undercover police officers with the Las Vegas Metropolitan Police Department (Metro) reported large amounts of cocaine (four kilograms) and travelers' checks (almost $300,000) missing from a safety deposit vault at Western Vault Corporation. The drugs and money had been used as part of an undercover

operation conducted by Metro's Intelligence Bureau. Petitioner's client, Grady Sanders, owned Western Vault. John Moran, the Las Vegas sheriff, reported the theft at a press conference on February 2, 1987, naming the police and Western Vault employees as suspects.

Although two police officers, Detective Steve Scholl and Sargeant Ed Schaub, enjoyed free access to the deposit box throughout the period of the theft, and no log reported comings and goings at the vault, a series of press reports over the following year indicated that investigators did not consider these officers responsible. Instead, investigators focused upon Western Vault and its owner. Newspaper reports quoted the sheriff and other high police officials as saying that they had not lost confidence in the "elite" Intelligence Bureau. From the beginning, Sheriff Moran had "complete faith and trust" in his officers. App. 85.

The media reported that, following announcement of the cocaine theft, others with deposit boxes at Western Vault had come forward to claim missing items. One man claimed the theft of his life savings of $90,000. *Id.*, at 89. Western Vault suffered heavy losses as customers terminated their box rentals, and the company soon went out of business. The police opened other boxes in search of the missing items, and it was reported they seized $264,900 in United States currency from a box listed as unrented.

Initial press reports stated that Sanders and Western Vault were being cooperative; but as time went on, the press noted that the police investigation had failed to identify the culprit and through a process of elimination was beginning to point toward Sanders. Reports quoted the affidavit of a detective that the theft was part of an effort to discredit the undercover operation and that business records suggested the existence of a business relation between Sanders and the targets of a Metro undercover probe. *Id.*, at 85.

The deputy police chief announced the two detectives with access to the vault had been "cleared" as possible suspects.

According to an unnamed "source close to the investigation," the police shifted from the idea that the thief had planned to discredit the undercover operation to the theory that the thief had unwittingly stolen from the police. The stories noted that Sanders "could not be reached for comment." *Id.*, at 93.

The story took a more sensational turn with reports that the two police suspects had been cleared by police investigators after passing lie detector tests. The tests were administered by one Ray Slaughter. But later, the Federal Bureau of Investigation (FBI) arrested Slaughter for distributing cocaine to an FBI informant, Belinda Antal. It was also reported that the $264,900 seized from the unrented safety deposit box at Western Vault had been stored there in a suitcase owned by one Tammy Sue Markham. Markham was "facing a number of federal drug-related charges" in Tucson, Arizona. Markham reported items missing from three boxes she rented at Western Vault, as did one Beatrice Connick, who, according to press reports, was a Columbian national living in San Diego and "not facing any drug related charges." (As it turned out, petitioner impeached Connick's credibility at trial with the existence of a money laundering conviction.) Connick also was reported to have taken and passed a lie detector test to substantiate her charges. *Id.*, at 94–97. Finally, press reports indicated that Sanders had refused to take a police polygraph examination. *Id.*, at 41. The press suggested that the FBI suspected Metro officers were responsible for the theft, and reported that the theft had severely damaged relations between the FBI and Metro.

B

The Press Conference. Petitioner is a Las Vegas criminal defense attorney, an author of articles about criminal law and procedure, and a former associate dean of the National College for Criminal Defense Lawyers and Public Defenders. *Id.*, at 36–38. Through leaks from the police department, he

had some advance notice of the date an indictment would be returned and the nature of the charges against Sanders. Petitioner had monitored the publicity surrounding the case, and, prior to the indictment, was personally aware of at least 17 articles in the major local newspapers, the Las Vegas Sun and Las Vegas Review-Journal, and numerous local television news stories which reported on the Western Vault theft and ensuing investigation. *Id.*, at 38–39; see Respondent's Exhibit A, before Disciplinary Board. Petitioner determined, for the first time in his career, that he would call a formal press conference. He did not blunder into a press conference, but acted with considerable deliberation.

1

Petitioner's Motivation. As petitioner explained to the disciplinary board, his primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors, in particular the repeated press reports about polygraph tests and the fact that the two police officers were no longer suspects. App. 40–42. Respondent distorts Rule 177 when it suggests this explanation admits a purpose to prejudice the venire and so proves a violation of the Rule. Rule 177 only prohibits the dissemination of information that one knows or reasonably should know has a "substantial likelihood of materially prejudicing an adjudicative proceeding." Petitioner did not indicate he thought he could sway the pool of potential jurors to form an opinion in advance of the trial, nor did he seek to discuss evidence that would be inadmissible at trial. He sought only to counter publicity already deemed prejudicial. The Southern Nevada Disciplinary Board so found. It said petitioner attempted

> "(i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) . . . to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case." App. 3–4.

Far from an admission that he sought to "materially prejudic[e] an adjudicative proceeding," petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors against his client and injuring his client's reputation in the community.

Petitioner gave a second reason for holding the press conference, which demonstrates the additional value of his speech. Petitioner acted in part because the investigation had taken a serious toll on his client. Sanders was "not a man in good health," having suffered multiple open-heart surgeries prior to these events. *Id.*, at 41. And prior to indictment, the mere suspicion of wrongdoing had caused the closure of Western Vault and the loss of Sanders' ground lease on an Atlantic City, New Jersey, property. *Ibid.*

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

Petitioner's Investigation of Rule 177. Rule 177 is phrased in terms of what an attorney "knows or reasonably should know." On the evening before the press conference, petitioner and two colleagues spent several hours researching the extent of an attorney's obligations under Rule 177. He decided, as we have held, see *Patton* v. *Yount*, 467 U. S. 1025 (1984), that the timing of a statement was crucial in the assessment of possible prejudice and the Rule's application, accord, *Stroble* v. *California*, 343 U. S. 181, 191–194 (1952). App. 44.

Upon return of the indictment, the court set a trial date for August 1988, some six months in the future. Petitioner knew, at the time of his statement, that a jury would not be empaneled for six months at the earliest, if ever. He recalled reported cases finding no prejudice resulting from juror exposure to "far worse" information two and four months before trial, and concluded that his proposed statement was not substantially likely to result in material prejudice. *Ibid.*

A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (timing of statement a significant factor in determining seriousness and imminence of threat). As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.

In 1988, Clark County, Nevada, had population in excess of 600,000 persons. Given the size of the community from which any potential jury venire would be drawn and the length of time before trial, only the most damaging of information could give rise to any likelihood of prejudice. The innocuous content of petitioner's statements reinforces my conclusion.

3

The Content of Petitioner's Statements. Petitioner was disciplined for statements to the effect that (1) the evidence demonstrated his client's innocence, (2) the likely thief was a police detective, Steve Scholl, and (3) the other victims were not credible, as most were drug dealers or convicted money launderers, all but one of whom had only accused Sanders in response to police pressure, in the process of "trying to work themselves out of something." Appendix A, *infra*, at 1059. App. 2–3 (Findings and Recommendation of the State Bar of Nevada, Southern Nevada Disciplinary Board). He also strongly implied that Steve Scholl could be observed in a videotape suffering from symptoms of cocaine use. Of course, only a small fraction of petitioner's remarks were disseminated to the public, in two newspaper stories and two television news broadcasts.

The stories mentioned not only Gentile's press conference but also a prosecution response and police press conference. See App. 127–129, 131–132; Respondent's Exhibit A, before Disciplinary Board.[1] The chief deputy district attorney was

[1] The sole summary of television reports of the press conference contained in the record is as follows:

"2–5–88:

"GENTILE NEWS CONFERENCE STORY. GENTILE COMPARES THE W. VAULT BURGLARY TO THE FRENCH CONNECTION CASE IN WHICH THE BAD GUYS WERE COPS. GENTILE SAYS THE EVIDENCE IS CIRCUMSTANTIAL AND THAT THE COPS SEEM THE MORE LIKELY CULPRITS, THAT DET. SCHOLL HAS SHOWN SIGNS OF DRUG USE, THAT THE OTHER CUSTOMERS WERE PRESSURED INTO COMPLAINING BY METRO, THAT THOSE CUSTOMERS ARE KNOWN DRUG DEALERS, AND THAT OTHER AGENCIES HAVE OPERATED OUT OF W. VAULT WITHOUT HAVING SIMILAR PROBLEMS.

"2–5–88: *METRO NEWS CONFERENCE IN WHICH CHIEF SULLIVAN EXPLAINS THAT THE OFFICERS INVOLVED HAVE BEEN CLEARED BY POLYGRAPH TESTS.* STORY MENTIONS THAT THE POLYGRAPHER WAS RAY SLAUGHTER, UNUSUAL BECAUSE SLAUGHTER IS A PRIVATE EXAMINER, NOT A METRO EXAMINER. REPORTER DETAILS SLAUGHTER'S BACK-

quoted as saying that this was a legitimate indictment, and that prosecutors cannot bring an indictment to court unless they can prove the charges in it beyond a reasonable doubt. App. 128–129. Deputy Police Chief Sullivan stated for the police department: "'We in Metro are very satisfied our officers (Scholl and Sgt. Ed Schaub) had nothing to do with this theft or any other. They are both above reproach. Both are veteran police officers who are dedicated to honest law enforcement.'" *Id.*, at 129. In the context of general public awareness, these police and prosecution statements were no more likely to result in prejudice than were petitioner's statements, but given the repetitive publicity from the police investigation, it is difficult to come to any conclusion but that the balance remained in favor of the prosecution.

Much of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice. See ABA Annotated Model Rules of Professional Conduct 243 (1984) (extent to which information already circulated significant factor in determining likelihood of prejudice). The remainder, and details petitioner refused to provide, were available to any journalist willing to do a little bit of investigative work.

Petitioner's statements lack any of the more obvious bases for a finding of prejudice. Unlike the police, he refused to comment on polygraph tests except to confirm earlier reports that Sanders had not submitted to the police polygraph; he mentioned no confessions and no evidence from searches or test results; he refused to elaborate upon his charge that the other so-called victims were not credible, except to explain his general theory that they were pressured to testify in an attempt to avoid drug-related legal trouble, and that some of

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GROUND, INCLUDING HIS TEST OF JOHN MORAN REGARDING SPILOTRO CONTRIBUTIONS. ALSO MENTIONS SLAUGHTER'S DRUG BUST, SPECULATES ABOUT WHETHER IT WAS A SETUP BY THE FBI. QUOTES GENTILE AS SAYING THE TWO CASES ARE DEFINITELY RELATED." App. 131–132 (emphasis added).

them may have asserted claims in an attempt to collect insurance money.

C

Events Following the Press Conference. Petitioner's judgment that no likelihood of material prejudice would result from his comments was vindicated by events at trial. While it is true that Rule 177's standard for controlling pretrial publicity must be judged at the time a statement is made, *ex post* evidence can have probative value in some cases. Here, where the Rule purports to demand, and the Constitution requires, consideration of the character of the harm and its heightened likelihood of occurrence, the record is altogether devoid of facts one would expect to follow upon any statement that created a real likelihood of material prejudice to a criminal jury trial.

The trial took place on schedule in August 1988, with no request by either party for a venue change or continuance. The jury was empaneled with no apparent difficulty. The trial judge questioned the jury venire about publicity. Although many had vague recollections of reports that cocaine stored at Western Vault had been stolen from a police undercover operation, and, as petitioner had feared, one remembered that the police had been cleared of suspicion, not a single juror indicated any recollection of petitioner or his press conference. App. 48–49; Respondent's Exhibit B, before Disciplinary Board.

At trial, all material information disseminated during petitioner's press conference was admitted in evidence before the jury, including information questioning the motives and credibility of supposed victims who testified against Sanders, and Detective Scholl's ingestion of drugs in the course of undercover operations (in order, he testified, to gain the confidence of suspects). App. 47. The jury acquitted petitioner's client, and, as petitioner explained before the disciplinary board,

> "when the trial was over with and the man was acquitted the next week the foreman of the jury phoned me and said to me that if they would have had a verdict form before them with respect to the guilt of Steve Scholl they would have found the man proven guilty beyond a reasonable doubt." *Id.*, at 47–48.

There is no support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech.

III

As interpreted by the Nevada Supreme Court, the Rule is void for vagueness, in any event, for its safe harbor provision, Rule 177(3), misled petitioner into thinking that he could give his press conference without fear of discipline. Rule 177(3)(a) provides that a lawyer "may state without elaboration . . . the general nature of the . . . defense." Statements under this provision are protected "[n]otwithstanding subsection 1 and 2 (a–f)." By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the . . . defense" "without elaboration" need fear no discipline, even if he comments on "[t]he character, credibility, reputation or criminal record of a . . . witness," and even if he "knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Given this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide "'fair notice to those to whom [it] is directed.'" *Grayned* v. *City of Rockford*, 408 U. S. 104, 112 (1972). A lawyer seeking to avail himself of Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic

terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

Petitioner testified he thought his statements were protected by Rule 177(3), App. 59. A review of the press conference supports that claim. He gave only a brief opening statement, see Appendix A, *infra*, at 1059–1060, and on numerous occasions declined to answer reporters' questions seeking more detailed comments. One illustrative exchange shows petitioner's attempt to obey the rule:

> "QUESTION FROM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.
>
> "Can we go through it and *elaborate* on their backgrounds, interests—
>
> "MR. GENTILE: *I can't because ethics prohibit me from doing so.*
>
> "Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?
>
> "I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work." App. to Pet. for Cert. 11a (emphasis added).[2]

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[2] Other occasions are as follows:

"QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and—

"MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof

Nevertheless, the disciplinary board said only that petitioner's comments "went beyond the scope of the statements permitted by SCR 177(3)," App. 5, and the Nevada Supreme

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shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

"QUESTION FROM THE FLOOR: What is that? What is that proof?

"MR. GENTILE: It'll come out; it'll come out." App. to Pet. for Cert. 9a.

"QUESTION FROM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

"MR. GENTILE: Well, I couldn't agree with them more.

"QUESTION FROM THE FLOOR: Do you know anything about it?

"MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

"All I can tell you is that you're in for a very interesting six months to a year as this case develops." *Id.*, at 10a.

"QUESTION FROM THE FLOOR: Did the cops pass the polygraph?

"MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

"QUESTION FROM THE FLOOR: Do you think the Slaughter case—that there's a connection?

"MR. GENTILE: Absolutely. I don't think there is any question about it, and—

"QUESTION FROM THE FLOOR: What is that?

"MR. GENTILE: Well, it's intertwined to a great deal, I think.

"I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.

"QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate—legitimately passed lie detector tests?

"MR. GENTILE: I don't want to comment on that for two reasons:

"Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

"But, secondly, I don't have much faith in polygraph tests.

"QUESTION FROM THE FLOOR: Did [Sanders] ever take one?

"MR. GENTILE: The police polygraph?

"QUESTION FROM THE FLOOR: Yes.

"MR. GENTILE: No, he didn't take a police polygraph.

"QUESTION FROM THE FLOOR: Did he take one with you?

"MR. GENTILE: I'm not going to disclose that now." *Id.*, at 12a–13a.

Court's rejection of petitioner's defense based on Rule 177(3) was just as terse, App. to Pet. for Cert. 4a. The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary.

The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, *Kolender* v. *Lawson*, 461 U. S. 352, 357–358, 361 (1983); *Smith* v. *Goguen*, 415 U. S. 566, 572–573 (1974), for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility. The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

IV

The analysis to this point resolves the case, and in the usual order of things the discussion should end here. Five Members of the Court, however, endorse an extended discussion which concludes that Nevada may interpret its requirement of substantial likelihood of material prejudice under a standard more deferential than is the usual rule where speech is concerned. It appears necessary, therefore, to set forth my objections to that conclusion and to the reasoning which underlies it.

Respondent argues that speech by an attorney is subject to greater regulation than speech by others, and restrictions on an attorney's speech should be assessed under a balancing test that weighs the State's interest in the regulation of a

specialized profession against the lawyer's First Amendment interest in the kind of speech that was at issue. The cases cited by our colleagues to support this balancing, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977); *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); and *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20 (1984), involved either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. Neither of those categories, nor the underlying interests which justified their creation, were implicated here. Petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wide-open balancing of interests is not appropriate in this context.

A

Respondent would justify a substantial limitation on speech by attorneys because "lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations," and so lawyers' statements "are likely to be received as especially authoritative." Brief for Respondent 22. Rule 177, however, does not reflect concern for the attorney's special access to client confidences, material gained through discovery, or other proprietary or confidential information. We have upheld restrictions upon the release of information gained "only by virtue of the trial court's discovery processes." *Seattle Times Co.* v. *Rhinehart*, *supra*, at 32. And *Seattle Times* would prohibit release of discovery information by the attorney as well as the client. Similar rules require an attorney to maintain client confidences. See, *e. g.*, ABA Model Rule of Professional Conduct 1.6 (1981).

This case involves no speech subject to a restriction under the rationale of *Seattle Times*. Much of the information in

petitioner's remarks was included by explicit reference or fair inference in earlier press reports. Petitioner could not have learned what he revealed at the press conference through the discovery process or other special access afforded to attorneys, for he spoke to the press on the day of indictment, at the outset of his formal participation in the criminal proceeding. We have before us no complaint from the prosecutors, police, or presiding judge that petitioner misused information to which he had special access. And there is no claim that petitioner revealed client confidences, which may be waived in any event. Rule 177, on its face and as applied here, is neither limited to nor even directed at preventing release of information received through court proceedings or special access afforded attorneys. Cf. *Butterworth* v. *Smith*, 494 U. S., at 632–634. It goes far beyond this.

B

Respondent relies upon *obiter dicta* from *In re Sawyer*, 360 U. S. 622 (1959), *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), and *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), for the proposition that an attorney's speech about ongoing proceedings must be subject to pervasive regulation in order to ensure the impartial adjudication of criminal proceedings. *In re Sawyer* involved general comments about Smith Act prosecutions rather than the particular proceeding in which the attorney was involved, conduct which we held not sanctionable under the applicable ABA Canon of Professional Ethics, quite apart from any resort to First Amendment principles. *Nebraska Press Assn.* considered a challenge to a court order barring the press from reporting matters most prejudicial to the defendant's Sixth Amendment trial right, not information released by defense counsel. In *Sheppard* v. *Maxwell*, we overturned a conviction after a trial that can only be described as a circus, with the courtroom taken over by the press and jurors turned into media stars. The prejudice to Dr. Sheppard's fair trial right can be traced in princi-

pal part to police and prosecutorial irresponsibility and the trial court's failure to control the proceedings and the courthouse environment. Each case suggests restrictions upon information release, but none confronted their permitted scope.

At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, *e. g.*, *In re Primus*, 436 U. S. 412 (1978); *Bates* v. *State Bar of Arizona*, *supra*. We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

V

Even if respondent is correct, and as in *Seattle Times* we must balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved,'" *Seattle Times*, *supra*, at 32 (quoting *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974)), the Rule as interpreted by Nevada fails the searching inquiry required by those precedents.

A

Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it

and base their verdict upon the evidence presented in court. See generally Simon, Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?, 29 Stan. L. Rev. 515 (1977); Drechsel, An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue, 18 Hofstra L. Rev. 1 (1989). *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial. All of these factors weigh in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections. Our colleagues' historical survey notwithstanding, respondent has not demonstrated any sufficient state interest in restricting the speech of attorneys to justify a lower standard of First Amendment scrutiny.

Still less justification exists for a lower standard of scrutiny here, as this speech involved not the prosecutor or police, but a criminal defense attorney. Respondent and its *amici* present not a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State's case. Even discounting the obvious reason for a lack of appellate decisions on the topic—the difficulty of appealing a verdict of acquittal—the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable.

The various bar association and advisory commission reports which resulted in promulgation of ABA Model Rule of Professional Conduct 3.6 (1981), and other regulations of attorney speech, and sources they cite, present no convincing case for restrictions upon the speech of defense attorneys. See Swift, Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity, 64 B. U. L. Rev. 1003, 1031–1049 (1984) (summarizing studies and concluding there is no empirical or anecdotal evidence of a need for restrictions on defense publicity); see also Drechsel, *supra*, at 35 ("[D]ata

showing the heavy reliance of journalists on law enforcement sources and prosecutors confirms the appropriateness of focusing attention on those sources when attempting to control pre-trial publicity"). The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny.

B

Respondent uses the "officer of the court" label to imply that attorney contact with the press somehow is inimical to the attorney's proper role. Rule 177 posits no such inconsistency between an attorney's role and discussions with the press. It permits all comment to the press absent "a substantial likelihood of materially prejudicing an adjudicative proceeding." Respondent does not articulate the principle that contact with the press cannot be reconciled with the attorney's role or explain how this might be so.

Because attorneys participate in the criminal justice system and are trained in its complexities, they hold unique qualifications as a source of information about pending cases. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242, 250 (CA7 1975). To the extent the press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the

public of speech by members of the bar. If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent.

One may concede the proposition that an attorney's speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney's duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties. An attorney's position may result in some added ability to obstruct the proceedings through well-timed statements to the press, though one can debate the extent of an attorney's ability to do so without violating other established duties. A court can require an attorney's cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest might support additional regulation of speech. But this case involves the sanction of speech so innocuous, and an application of Rule 177(3)'s safe harbor provision so begrudging, that it is difficult to determine the force these arguments would carry in a different setting. The instant case is a poor vehicle for defining with precision the outer limits under the Constitution of a court's ability to regulate an attorney's statements about ongoing adjudicative proceedings. At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is nec-

essary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment.[3]

VI

The judgment of the Supreme Court of Nevada is

Reversed.

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[3] Petitioner argues that Rule 177(2) is a categorical speech prohibition which fails First Amendment analysis because of overbreadth. Petitioner interprets this subsection as providing that particular statements are "presumptively prohibited regardless of the circumstances surrounding the speech." Brief for Petitioner 48. Respondent does not read Rule 177(2)'s list of statements "ordinarily likely" to create material prejudice as establishing an evidentiary presumption, but rather as intended to "assist a lawyer" in compliance. Brief for Respondent 28, n. 27. The opinions of the Disciplinary Board and the Nevada Supreme Court do not address this point, though petitioner's reading is plausible, and at least one treatise supports petitioner's reading. See G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 398–399 (1985) (analogous subsection (b) of ABA Model Rule 3.6 creates a presumption of prejudice). Given the lack of any discussion in the lower court opinion, and the other difficulties we find, we do not address these arguments.

APPENDIX TO OPINION OF KENNEDY, J.

Appendix A

Petitioner's Opening Remarks at the Press Conference of February 5, 1988. App. to Pet. for Cert. 8a–9a.

"MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases—at least two cases there—have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

"When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and money, the American Express Travelers' checks, is Detective Steve Scholl.

"There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

"And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office.

"Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

"Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

"Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' c[h]ecks were missing.

"Many of the contracts that these people had show on the face of the contract that there is $100,000 in insurance for the contents of the box.

"If you look at the indictment very closely, you're going to see that these claims fall under $100,000.

"Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

"And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

"That's about all that I have to say."

[Questions from the floor followed.]

Appendix B

Nevada Supreme Court Rule 177, as in effect prior to January 5, 1991.

"Trial Publicity

"1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

"2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

"(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

"(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

"(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

"(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

"(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

"(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

"3. Notwithstanding subsection 1 and 2(a–f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

"(a) the general nature of the claim or defense;

"(b) the information contained in a public record;

"(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

"(d) the scheduling or result of any step in litigation;

"(e) a request for assistance in obtaining evidence and information necessary thereto;

"(f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

"(g) in a criminal case:

"(i) the identity, residence, occupation and family status of the accused;

"(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

"(iii) the fact, time and place of arrest; and

"(iv) the identity of investigating and arresting officers or agencies and the length of the investigation."

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I and II, and delivered a dissenting opinion with respect to Part III, in which JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE SOUTER join.

Petitioner was disciplined for making statements to the press about a pending case in which he represented a criminal defendant. The state bar, and the Supreme Court of Nevada on review, found that petitioner knew or should have known that there was a substantial likelihood that his statements would materially prejudice the trial of his client. Nonetheless, petitioner contends that the First Amendment to the United States Constitution requires a stricter standard to be met before such speech by an attorney may be disci-

plined: there must be a finding of "actual prejudice or a substantial and imminent threat to fair trial." Brief for Petitioner 15. We conclude that the "substantial likelihood of material prejudice" standard applied by Nevada and most other States satisfies the First Amendment.

I

Petitioner's client was the subject of a highly publicized case, and in response to adverse publicity about his client, Gentile held a press conference on the day after Sanders was indicted. At the press conference, petitioner made, among others, the following statements:

> "When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl.
>
> "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.
>
> . . . . . .
>
> ". . . the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.
>
> "Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who

are going to say now that you can believe them." App. to Pet. for Cert. 8a–9a.

The following statements were in response to questions from members of the press:

". . . because of the stigma that attaches to merely being accused—okay—I know I represent an innocent man . . . . The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

"I don't take cheap shots like this. I represent an innocent guy. All right?

. . . . .

"[The police] were playing very fast and loose. . . . We've got some video tapes that if you take a look at them, I'll tell you what, [Detective Scholl] either had a hell of a cold or he should have seen a better doctor." *Id.*, at 12a, 14a.

Articles appeared in the local newspapers describing the press conference and petitioner's statements. The trial took place approximately six months later, and although the trial court succeeded in empaneling a jury that had not been affected by the media coverage and Sanders was acquitted on all charges, the state bar disciplined petitioner for his statements.

The Southern Nevada Disciplinary Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. It also found that petitioner believed others whom he characterized as money launderers and drug dealers would be called as prosecution witnesses. Petitioner's admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case. The board found that in light of the

statements, their timing, and petitioner's purpose, petitioner knew or should have known that there was a substantial likelihood that the statements would materially prejudice the Sanders trial.

The Nevada Supreme Court affirmed the board's decision, finding by clear and convincing evidence that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." 106 Nev. 60, 62, 787 P. 2d 386, 387 (1990). The court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses." *Ibid.* The court concluded that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.*

II

Gentile asserts that the same stringent standard applied in *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), to restraints on press publication during the pendency of a criminal trial should be applied to speech by a lawyer whose client is a defendant in a criminal proceeding. In that case, we held that in order to suppress press commentary on evidentiary matters, the State would have to show that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.*, at 569. Respondent, on the other hand, relies on statements in cases such as *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), which sharply distinguished between restraints on the press and restraints on lawyers whose clients are parties to the proceeding:

> "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.*, at 363.

To evaluate these opposing contentions, some reference must be made to the history of the regulation of the practice of law by the courts.

In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. "Membership in the bar is a privilege burdened with conditions," to use the oft-repeated statement of Cardozo, J., in *In re Rouss*, 221 N. Y. 81, 84, 116 N. E. 782, 783 (1917), quoted in *Theard* v. *United States*, 354 U. S. 278, 281 (1957).

More than a century ago, the first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to "Avoid Newspaper Discussion of Legal Matters," and stated that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." H. Drinker, Legal Ethics 23, 356 (1953). In 1908, the American Bar Association promulgated its own code, entitled "Canons of Professional Ethics." Many States thereafter adopted the ABA Canons for their own jurisdictions. Canon 20 stated:

> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

In the last quarter century, the legal profession has reviewed its ethical limitations on extrajudicial statements by lawyers in the context of this Court's cases interpreting the First Amendment. ABA Model Rule of Professional Responsibility 3.6 resulted from the recommendations of the Advisory Committee on Fair Trial and Free Press (Advisory Committee), created in 1964 upon the recommendation of the Warren Commission. The Warren Commission's report on the assassination of President Kennedy included the recommendation that

> "representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial."

Report of the President's Commission on the Assassination of President Kennedy (1964), quoted in Ainsworth, "Fair Trial-Free Press," 45 F. R. D. 417 (1968). The Advisory Committee developed the ABA Standards Relating to Fair Trial and Free Press, comprehensive guidelines relating to disclosure of information concerning criminal proceedings, which were relied upon by the ABA in 1968 in formulating Rule 3.6. The need for, and appropriateness of, such a rule had been identified by this Court two years earlier in *Sheppard* v. *Maxwell*, *supra*, at 362–363. In 1966, the Judicial Conference of the United States authorized a "Special Subcommittee to Implement *Sheppard* v. *Maxwell*" to proceed with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. See Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F. R. D. 391, 404–407 (1968). Courts, responding to the recommendations in this report, proceeded to enact local rules incorporating these standards, and thus the "reasonable likelihood of prejudicing a fair trial" test was used by a majority of courts,

state and federal, in the years following *Sheppard*. Ten years later, the ABA amended its guidelines, and the "reasonable likelihood" test was changed to a "clear and present danger" test. ABA Standards for Criminal Justice 8–1.1 (as amended 1978) (2d ed. 1980, Supp. 1986).

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised fair trial-free press standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated, and instead adopted the "substantial likelihood of material prejudice" test. Currently, 31 States in addition to Nevada have adopted—either verbatim or with insignificant variations—Rule 3.6 of the ABA's Model Rules.[1] Eleven States have adopted Disciplinary Rule 7–107 of the ABA's Code of Professional Responsibility, which is less protective of lawyer speech than Model Rule 3.6, in that it applies a "reasonable likelihood of prejudice" standard.[2] Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate "clear and present danger."[3]

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[1] Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wyoming have adopted Model Rule 3.6 verbatim. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Model Rule 3.6 with minor modifications that are irrelevant to the issues presented in this case. Michigan and Washington have adopted only subsection (a) of Model Rule 3.6, and Minnesota has adopted only subsection (a) and limits its application to "pending criminal jury trial[s]." Utah adopted a version of Model Rule 3.6 employing a "substantial likelihood of materially influencing" test.

[2] Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee, and Vermont have adopted Disciplinary Rule 7–107 verbatim. North Carolina also uses the "reasonable likelihood of . . . prejudic[e]" test. Rule of Professional Conduct 7.7 (1991).

[3] Illinois Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat to the fairness of an adjudicative proceeding"); Maine Bar Rule of

Petitioner maintains, however, that the First Amendment to the United States Constitution requires a State, such as Nevada in this case, to demonstrate a "clear and present danger" of "actual prejudice or an imminent threat" before any discipline may be imposed on a lawyer who initiates a press conference such as occurred here.[4] He relies on decisions such as *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), *Bridges* v. *California*, 314 U. S. 252 (1941), *Pennekamp* v. *Florida*, 328 U. S. 331 (1946), and *Craig* v. *Harney*, 331 U. S. 367 (1947), to support his position. In those cases we held that trial courts might not constitutionally punish, through use of the contempt power, newspapers and others for publishing editorials, cartoons, and other items critical of judges in particular cases. We held that such punishments could be imposed only if there were a clear and present danger of "some serious substantive evil which they are designed to avert." *Bridges* v. *California*, *supra*, at 270. Petitioner also relies on *Wood* v. *Georgia*, 370 U. S.

Professional Responsibility 3.7(j) (1990) ("substantial danger of interference with the administration of justice"); North Dakota Rule of Professional Conduct 3.6 (1990) ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); Oregon DR 7–107 (1991) ("serious and imminent threat to the fact-finding process in an adjudicative proceeding and acts with indifference to that effect"); and the District of Columbia DR 7–101 (Supp. 1991) ("serious and imminent threat to the impartiality of the judge or jury").

[4] We disagree with JUSTICE KENNEDY's statement that this case "does not call into question the constitutionality of other States' prohibitions upon an attorney's speech that will have a 'substantial likelihood of materially prejudicing an adjudicative proceeding,' but is limited to Nevada's interpretation of that standard." *Ante*, at 1034. Petitioner challenged Rule 177 as being unconstitutional on its face in addition to as applied, contending that the "substantial likelihood of material prejudice" test was unconstitutional, and that lawyer speech should be punished only if it violates the standard for clear and present danger set forth in *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976). See Brief for Petitioner 27–31. The validity of the rules in the many States applying the "substantial likelihood of material prejudice" test has, therefore, been called into question in this case.

375 (1962), which held that a court might not punish a sheriff for publicly criticizing a judge's charges to a grand jury.

Respondent State Bar of Nevada points out, on the other hand, that none of these cases involved lawyers who represented parties to a pending proceeding in court. It points to the statement of Holmes, J., in *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 463 (1907), that "[w]hen a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." Respondent also points to a similar statement in *Bridges*, *supra*, at 271:

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

These opposing positions illustrate one of the many dilemmas which arise in the course of constitutional adjudication. The above quotes from *Patterson* and *Bridges* epitomize the theory upon which our criminal justice system is founded: The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media. The First Amendment protections of speech and press have been held, in the cases cited above, to require a showing of

"clear and present danger" that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial. The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard before he is disciplined for public pronouncements about the case, or whether the State instead may penalize that sort of speech upon a lesser showing.

It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Sacher* v. *United States*, 343 U. S. 1, 8 (1952) (criminal trial); *Fisher* v. *Pace*, 336 U. S. 155 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U. S. 622 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.*, at 646. He said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.*, at 646–647. The four dissenting Justices who would have sustained the discipline said:

> "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.
>
> . . . . . .
>
> "He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.*, at 666, 668 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

Likewise, in *Sheppard* v. *Maxwell*, where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

> "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" 384 U. S., at 363 (emphasis added).

We expressly contemplated that the speech of *those participating before the courts* could be limited.[5] This distinction

[5] The Nevada Supreme Court has consistently read all parts of Rule 177 as applying only to lawyers in pending cases, and not to other lawyers or nonlawyers. We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made. We note that of all the cases petitioner cites as supporting the use of the clear and present danger

between participants in the litigation and strangers to it is brought into sharp relief by our holding in *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20 (1984). There, we unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery. In that case we said that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting," *id.*, at 32–33, n. 18 (citation omitted), and noted that "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Ibid.*

Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977); *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 9 (1990); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). In each of these cases, we engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. These cases

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standard, the only one that even arguably involved a nonthird party was *Wood* v. *Georgia*, 370 U. S. 375 (1962), where a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an "officer of the court" by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. *Id.*, at 393. The same cannot be said about petitioner, whose statements were made in the course of, and in furtherance of, his role as defense counsel.

recognize the long-established principle stated in *In re Cohen*, 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, 675 (1960):

> "Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, an instrument . . . of justice . . . .'" (quoted in *Cohen* v. *Hurley*, 366 U. S. 117, 126 (1961)).

We think that the quoted statements from our opinions in *In re Sawyer*, 360 U. S. 622 (1959), and *Sheppard* v. *Maxwell*, *supra*, rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press*, which was joined by Justices Stewart and MARSHALL, "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.*, at 601, n. 27. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. See, *e. g.*, *In re Hinds*, 90 N. J. 604, 627, 449 A. 2d 483, 496 (1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel*, 90 N. J. 646, 656, 449 A. 2d 505, 511 (1982) (attorneys' role as advocates

gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question. See, *e. g.*, *Seattle Times*, *supra*, at 32. The "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. See, *e. g.*, *Sheppard*, 384 U. S., at 350–351; *Turner* v. *Louisiana*, 379 U. S. 466, 473 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections). Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner. The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.

The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

III

To assist a lawyer in deciding whether an extrajudicial statement is problematic, Rule 177 sets out statements that are likely to cause material prejudice. Contrary to petitioner's contention, these are not improper evidentiary presumptions. Model Rule 3.6, from which Rule 177 was derived, was specifically designed to avoid the categorical prohibitions of attorney speech contained in ABA Model Code of Professional Responsibility Disciplinary Rule 7–107 (1981). See ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Notes and Comments 143–144 (Proposed Final Draft, May 30, 1981) (Proposed Final Draft). The statements listed as likely to cause material prejudice closely track a similar list outlined by this Court in *Sheppard:*

> "The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. . . . Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity . . . .
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> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party,

witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements." 384 U. S., at 361.

Gentile claims that Rule 177 is overbroad, and thus unconstitutional on its face, because it applies to more speech than is necessary to serve the State's goals. The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford*, 408 U. S. 104, 114 (1972). To be unconstitutional, overbreadth must be "substantial." *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469, 485 (1989). Rule 177 is no broader than necessary to protect the State's interests. It applies only to lawyers involved in the pending case at issue, and even those lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding. The fact that Rule 177 applies to bench trials does not make it overbroad, for a substantial likelihood of prejudice is still required before the Rule is violated. That test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it. For these reasons Rule 177 is constitutional on its face.

Gentile also argues that Rule 177 is void for vagueness because it did not provide adequate notice that his comments were subject to discipline. The void-for-vagueness doctrine is concerned with a defendant's right to fair notice and ade-

quate warning that his conduct runs afoul of the law. See, *e. g.*, *Smith* v. *Goguen*, 415 U. S. 566, 572–573 (1974); *Colten* v. *Kentucky*, 407 U. S. 104, 110 (1972). Rule 177 was drafted with the intent to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." Proposed Final Draft 143. The Rule provides sufficient notice of the nature of the prohibited conduct. Under the circumstances of his case, petitioner cannot complain about lack of notice, as he has admitted that his primary objective in holding the press conference was the violation of Rule 177's core prohibition—to prejudice the upcoming trial by influencing potential jurors. Petitioner was clearly given notice that such conduct was forbidden, and the list of conduct likely to cause prejudice, while only advisory, certainly gave notice that the statements made would violate the Rule if they had the intended effect.

The majority agrees with petitioner that he was the victim of unconstitutional vagueness in the regulations because of the relationship between § 3 and §§ 1 and 2 of Rule 177 (see *ante*, at 1033–1034). Section 3 allows an attorney to state "the general nature of the claim or defense" notwithstanding the prohibition contained in § 1 and the examples contained in § 2. It is of course true, as the majority points out, that the word "general" and the word "elaboration" are both terms of degree. But combined as they are in the first sentence of § 3, they convey the very definite proposition that the authorized statements must not contain the sort of detailed allegations that petitioner made at his press conference. No sensible person could think that the following were "general" statements of a claim or defense made "without elaboration": "the person that was in the most direct position to have stolen the drugs and the money . . . is Detective Steve Scholl"; "there is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being"; "[Detective

Scholl] either had a hell of a cold, or he should have seen a better doctor"; and "the so-called other victims . . . one, two—four of them are known drug dealers and convicted money launderers." Section 3, as an exception to the provisions of §§ 1 and 2, must be read in the light of the prohibitions and examples contained in the first two sections. It was obviously not intended to negate the prohibitions or the examples wholesale, but simply intended to provide a "safe harbor" where there might be doubt as to whether one of the examples covered proposed conduct. These provisions were not vague as to the conduct for which petitioner was disciplined; "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 33 (1963).

Petitioner's strongest arguments are that the statements were made well in advance of trial, and that the statements did not in fact taint the jury panel. But the Supreme Court of Nevada pointed out that petitioner's statements were not only highly inflammatory—they portrayed prospective government witnesses as drug users and dealers, and as money launderers—but the statements were timed to have maximum impact, when public interest in the case was at its height immediately after Sanders was indicted. Reviewing independently the entire record, see *Pennekamp* v. *Florida*, 328 U. S., at 335, we are convinced that petitioner's statements were "substantially likely to cause material prejudice" to the proceedings. While there is evidence pro and con on that point, we find it persuasive that, by his own admission, petitioner called the press conference for the express purpose of influencing the venire. It is difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed.

While in a case such as this we must review the record for ourselves, when the highest court of a State has reached a determination "we give most respectful attention to its rea-

soning and conclusion." *Ibid.* The State Bar of Nevada, which made its own factual findings, and the Supreme Court of Nevada, which upheld those findings, were in a far better position than we are to appreciate the likely effect of petitioner's statements on potential members of a jury panel in a highly publicized case such as this. The board and the Nevada Supreme Court did not apply the list of statements likely to cause material prejudice as presumptions, but specifically found that petitioner had intended to prejudice the trial,[6] and that based upon the nature of the statements and their timing, they were in fact substantially likely to cause material prejudice. We cannot, upon our review of the record, conclude that they were mistaken. See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–396 (1948).

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[6]JUSTICE KENNEDY appears to contend that there can be no material prejudice when the lawyer's publicity is in response to publicity favorable to the other side. *Ante*, at 1041–1043. JUSTICE KENNEDY would find that publicity designed to counter prejudicial publicity cannot be itself prejudicial, despite its likelihood of influencing potential jurors, unless it actually would go so far as to cause jurors to be affirmatively biased in favor of the lawyer's client. In the first place, such a test would be difficult, if not impossible, to apply. But more fundamentally, it misconceives the constitutional test for an impartial juror—whether the "'juror can lay aside his impression or opinion and render a verdict on the evidence presented in court.'" *Murphy* v. *Florida*, 421 U. S. 794, 800 (1975) (quoting *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961)). A juror who may have been initially swayed from open-mindedness by publicity favorable to the prosecution is not rendered fit for service by being bombarded by publicity favorable to the defendant. The basic premise of our legal system is that lawsuits should be tried in court, not in the media. See, *e. g.*, *Bridges* v. *California*, 314 U. S. 252, 271 (1941); *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 462 (1970). A defendant may be protected from publicity by, or in favor of, the police, and prosecution through *voir dire*, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds. The remedy for prosecutorial abuses that violate the rule lies not in self-help in the form of similarly prejudicial comments by defense counsel, but in disciplining the prosecutor.

Several *amici* argue that the First Amendment requires the State to show actual prejudice to a judicial proceeding before an attorney may be disciplined for extrajudicial statements, and since the board and the Nevada Supreme Court found no actual prejudice, petitioner should not have been disciplined. But this is simply another way of stating that the stringent standard of *Nebraska Press* should be applied to the speech of a lawyer in a pending case, and for the reasons heretofore given we decline to adopt it. An added objection to the stricter standard when applied to lawyer participants is that if it were adopted, even comments more flagrant than those made by petitioner could not serve as the basis for disciplinary action if, for wholly independent reasons, they had no effect on the proceedings. An attorney who made prejudicial comments would be insulated from discipline if the government, for reasons unrelated to the comments, decided to dismiss the charges, or if a plea bargain were reached. An equally culpable attorney whose client's case went to trial would be subject to discipline. The United States Constitution does not mandate such a fortuitous difference.

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court . . . ." Rule 73, Nevada Supreme Court Rules (1991). The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.

I would affirm the decision of the Supreme Court of Nevada.

JUSTICE O'CONNOR, concurring.

I agree with much of THE CHIEF JUSTICE's opinion. In particular, I agree that a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. Lawyers are officers of the court

and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. See *In re Sawyer*, 360 U. S. 622, 646–647 (1959) (Stewart, J., concurring in result). This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies. I agree with THE CHIEF JUSTICE that the "substantial likelihood of material prejudice" standard articulated in Rule 177 passes constitutional muster. Accordingly, I join Parts I and II of THE CHIEF JUSTICE's opinion.

For the reasons set out in Part III of JUSTICE KENNEDY's opinion, however, I believe that Nevada's Rule is void for vagueness. Section (3) of Rule 177 is a "safe harbor" provision. It states that "notwithstanding" the prohibitory language located elsewhere in the Rule, "a lawyer involved in the investigation or litigation may state without elaboration . . . [t]he general nature of the claim or defense." Gentile made a conscious effort to stay within the boundaries of this "safe harbor." In his brief press conference, Gentile gave only a rough sketch of the defense that he intended to present at trial—*i. e.*, that Detective Scholl, not Grady Sanders, stole the cocaine and traveler's checks. When asked to provide more details, he declined, stating explicitly that the ethical rules compelled him to do so. *Ante*, at 1049. Nevertheless, the disciplinary board sanctioned Gentile because, in its view, his remarks went beyond the scope of what was permitted by the Rule. Both Gentile and the disciplinary board have valid arguments on their side, but this serves to support the view that the Rule provides insufficient guidance. As JUSTICE KENNEDY correctly points out, a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 42 (1991) (O'CONNOR, J., dissenting). I join Parts III and VI of JUSTICE KENNEDY's opinion reversing the judgment of the Nevada Supreme Court on that basis.

Syllabus

VIRGINIA BANKSHARES, INC., ET AL. *v.* SANDBERG ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89–1448. Argued October 9, 1990—Decided June 27, 1991

As part of a proposed "freeze-out" merger, in which First American Bank of Virginia (Bank) would be merged into petitioner Virginia Bankshares, Inc. (VBI), a wholly owned subsidiary of petitioner First American Bankshares, Inc. (FABI), the Bank's executive committee and board approved a price of $42 a share for the minority stockholders, who would lose their interests in the Bank after the merger. Although Virginia law required only that the merger proposal be submitted to a vote at a shareholders' meeting, preceded by a circulation of an informational statement to the shareholders, petitioner Bank directors nevertheless solicited proxies for voting on the proposal. Their solicitation urged the proposal's adoption and stated that the plan had been approved because of its opportunity for the minority shareholders to receive a "high" value for their stock. Respondent Sandberg did not give her proxy and filed suit in District Court after the merger was approved, seeking damages from petitioners for, *inter alia*, soliciting proxies by means of materially false or misleading statements in violation of § 14(a) of the Securities Exchange Act of 1934 and the Security and Exchange Commission's Rule 14a–9. Among other things, she alleged that the directors believed they had no alternative but to recommend the merger if they wished to remain on the board. At trial, she obtained a jury instruction, based on language in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 385, that she could prevail without showing her own reliance on the alleged misstatements, so long as they were material and the proxy solicitation was an "essential link" in the merger process. She was awarded an amount equal to the difference between the offered price and her stock's true value. The remaining respondents prevailed in a separate action raising similar claims. The Court of Appeals affirmed, holding that certain statements in the proxy solicitation, including the one regarding the stock's value, were materially misleading, and that respondents could maintain the action even though their votes had not been needed to effectuate the merger.

Held:

1. Knowingly false statements of reasons, opinion, or belief, even though conclusory in form, may be actionable under § 14(a) as misstatements of material fact within the meaning of Rule 14a–9. Pp. 1090–1098.

(a) Such statements are not *per se* inactionable under § 14(a). A statement of belief by corporate directors about a recommended course of action, or an explanation of their reasons for recommending it, may be materially significant, since there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. See *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449. Pp. 1090–1091.

(b) Statements of reasons, opinions, or beliefs are statements "with respect to . . . material fact[s]" within the meaning of the Rule. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, does not support petitioners' position that such statements should be placed outside the Rule's scope on policy grounds. There, the right to bring suit under § 10(b) of the Act was limited to actual stock buyers and sellers because of the risk of nuisance litigation, in which would-be sellers and buyers would manufacture claims of hypothetical action, unconstrained by independent evidence. In contrast, reasons for directors' recommendations or statements of belief are factual as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed. Thus, they are matters of corporate record subject to documentation, which can be supported or attacked by objective evidence outside a plaintiff's control. Conclusory terms in a commercial context are also reasonably understood to rest on a factual basis. Provable facts either furnish good reasons to make the conclusory judgment or count against it. And expressions of such judgments can be stated with knowledge of truth or falsity just like more definite statements and defended or attacked through the orthodox evidentiary process. Here, respondents presented facts about the Bank's assets and its actual and potential level of operation to prove that the directors' statement was misleading about the stock's value and a false explanation of the directors' beliefs. However, a director's disbelief or undisclosed motivation, standing alone, is an insufficient basis to sustain a § 14(a) action. Pp. 1091–1096.

(c) The fact that proxy material discloses an offending statement's factual basis limits liability for misstatements only if the inconsistency is so obvious that it neutralizes the misleading conclusion's capacity to influence the reasonable shareholder. The evidence here fell short of compelling the jury to find the misleading statement's facial materiality neutralized. Pp. 1096–1098.

2. Respondents cannot show causation of damages compensable under § 14(a). Pp. 1099–1108.

(a) Allowing shareholders whose votes are not required by law or corporate bylaw to authorize a corporate action subject to a proxy solicitation to bring an implied private action pursuant to *J. I. Case Co.* v. *Borak*, 377 U. S. 426, would extend the scope of *Borak* actions beyond

the ambit of *Mills* v. *Electric Auto-Lite Co.*, *supra*, which held that a proxy solicitation is an "essential link" to a transaction when it links a directors' proposal with the votes legally required to authorize the action proposed. And it is a serious obstacle to the expansion of the *Borak* right that there is no manifestation, in either the Act or its legislative history, of congressional intent to recognize a cause of action as broad as that proposed by respondents. Any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575, and the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended. Nonetheless, when faced with a claim for equality in rounding out the scope of an implied private action, this Court should look to policy reasons for deciding where the outer limits of the right should lie. See *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*. Pp. 1099–1105.

(b) Respondents' theory is rejected that a link existed and was essential because VBI and FABI, in order to avoid the minority stockholders' ill will, would have been unwilling to proceed with the merger without the approval manifested by the proxies. As was the case in *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, threats of speculative claims and procedural intractability are inherent in a theory linked through the directors' desire for a cosmetic vote. Causation would turn on inferences about what the directors would have thought and done without the minority shareholder approval. The issues would be hazy, their litigation protracted, and their resolution unreliable. Pp. 1105–1106.

(c) Respondents cannot rely on the theory that the proxy statement was an essential link in this case because it was part of a means to avoid suit under a Virginia state law that bars a shareholder from seeking to avoid a transaction tainted by a director's conflict of interest, if, *inter alia*, the minority shareholders ratified the transaction after disclosure of the material facts of the transaction and the conflict. Because there is no indication in the law or facts of this case that the proxy solicitation resulted in any such loss, this Court need not resolve the question whether § 14(a) provides a federal remedy when a false or misleading proxy statement results in a shareholder's loss of a state remedy. Pp. 1106–1108.

891 F. 2d 1112, reversed.

SOUTER, J., delivered the opinion of the Court, in Part I of which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, in Part II of which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined, and in Parts III and IV of which REHNQUIST, C. J., and WHITE, O'CON-

NOR, and SCALIA, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 1108. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 1110. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 1112.

Stephen M. Shapiro argued the cause for petitioners. With him on the briefs were *Andrew L. Frey*, *Kenneth S. Geller*, *John S. Stump*, and *Lewis T. Booker*.

Joseph M. Hassett argued the cause for respondents. With him on the brief were *John C. Keeney, Jr.*, and *George H. Mernick III*.

Michael R. Dreeben argued the cause for the Securities and Exchange Commission et al. as *amici curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson*, *Deputy Solicitor General Shapiro*, *James R. Doty*, *Paul Gonson*, *Jacob H. Stillman*, *Joseph A. Franco*, *Alfred J. T. Byrne*, and *Colleen B. Bombardier*.*

JUSTICE SOUTER delivered the opinion of the Court.

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n(a), authorizes the Securities and Exchange Commission (SEC) to adopt rules for the solicitation of proxies, and prohibits their violation.[1] In *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), we first recognized an

*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *John J. Gill III*, *Michael F. Crotty*, *Charles L. Marinaccio*, and *Richard M. Whiting*; and for the American Corporate Counsel Association et al. by *Nancy A. Nord*.

[1] Section 14(a) provides in full that:

"It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title." 15 U. S. C. § 78n(a).

implied private right of action for the breach of § 14(a) as implemented by SEC Rule 14a–9, which prohibits the solicitation of proxies by means of materially false or misleading statements.[2]

The questions before us are whether a statement couched in conclusory or qualitative terms purporting to explain directors' reasons for recommending certain corporate action can be materially misleading within the meaning of Rule 14a–9, and whether causation of damages compensable under § 14(a) can be shown by a member of a class of minority shareholders whose votes are not required by law or corporate bylaw to authorize the corporate action subject to the proxy solicitation. We hold that knowingly false statements of reasons may be actionable even though conclusory in form, but that respondents have failed to demonstrate the equitable basis required to extend the § 14(a) private action to such shareholders when any indication of congressional intent to do so is lacking.

I

In December 1986, First American Bankshares, Inc. (FABI), a bank holding company, began a "freeze-out" merger, in which the First American Bank of Virginia (Bank) eventually merged into Virginia Bankshares, Inc. (VBI), a

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[2] This Rule provides in relevant part that:

"No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." 17 CFR § 240.14a–9 (1990).

The Federal Deposit Insurance Corporation (FDIC) administers and enforces the securities laws with respect to the activities of federally insured and regulated banks. See § 12(i) of the Securities Exchange Act of 1934, 15 U. S. C. § 78*l*(i). An FDIC rule also prohibits materially misleading statements in the solicitation of proxies, 12 CFR § 335.206 (1991), and is essentially identical to Rule 14a–9. See generally Brief for SEC et al. as *Amici Curiae* 4, n. 5.

wholly owned subsidiary of FABI. VBI owned 85% of the Bank's shares, the remaining 15% being in the hands of some 2,000 minority shareholders. FABI hired the investment banking firm of Keefe, Bruyette & Woods (KBW) to give an opinion on the appropriate price for shares of the minority holders, who would lose their interests in the Bank as a result of the merger. Based on market quotations and unverified information from FABI, KBW gave the Bank's executive committee an opinion that $42 a share would be a fair price for the minority stock. The executive committee approved the merger proposal at that price, and the full board followed suit.

Although Virginia law required only that such a merger proposal be submitted to a vote at a shareholders' meeting, and that the meeting be preceded by circulation of a statement of information to the shareholders, the directors nevertheless solicited proxies for voting on the proposal at the annual meeting set for April 21, 1987.[3] In their solicitation, the directors urged the proposal's adoption and stated they had approved the plan because of its opportunity for the minority shareholders to achieve a "high" value, which they elsewhere described as a "fair" price, for their stock.

Although most minority shareholders gave the proxies requested, respondent Sandberg did not, and after approval of the merger she sought damages in the United States District Court for the Eastern District of Virginia from VBI, FABI, and the directors of the Bank. She pleaded two counts, one for soliciting proxies in violation of § 14(a) and Rule 14a–9, and the other for breaching fiduciary duties owed to the minority shareholders under state law. Under the first count, Sandberg alleged, among other things, that the directors had not believed that the price offered was high or that the terms

[3] Had the directors chosen to issue a statement instead of a proxy solicitation, they would have been subject to an SEC antifraud provision analogous to Rule 14a–9. See 17 CFR § 240.14c–6 (1990). See also 15 U. S. C. § 78n(c).

of the merger were fair, but had recommended the merger only because they believed they had no alternative if they wished to remain on the board. At trial, Sandberg invoked language from this Court's opinion in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 385 (1970), to obtain an instruction that the jury could find for her without a showing of her own reliance on the alleged misstatements, so long as they were material and the proxy solicitation was an "essential link" in the merger process.

The jury's verdicts were for Sandberg on both counts, after finding violations of Rule 14a–9 by all defendants and a breach of fiduciary duties by the Bank's directors. The jury awarded Sandberg $18 a share, having found that she would have received $60 if her stock had been valued adequately.

While Sandberg's case was pending, a separate action on similar allegations was brought against petitioners in the United States District Court for the District of Columbia by several other minority shareholders including respondent Weinstein, who, like Sandberg, had withheld his proxy. This case was transferred to the Eastern District of Virginia. After Sandberg's action had been tried, the Weinstein respondents successfully pleaded collateral estoppel to get summary judgment on liability.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgments, holding that certain statements in the proxy solicitation were materially misleading for purposes of the Rule, and that respondents could maintain their action even though their votes had not been needed to effectuate the merger. 891 F. 2d 1112 (1989).[4] We granted certiorari because of the importance of the issues presented. 495 U. S. 903 (1990).

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[4]The Court of Appeals reversed the District Court, however, on its refusal to certify a class of all minority shareholders in Sandberg's action. Consequently, it ruled that petitioners were liable to all of the Bank's former minority shareholders for $18 per share. 891 F. 2d, at 1119.

II

The Court of Appeals affirmed petitioners' liability for two statements found to have been materially misleading in violation of § 14(a) of the Act, one of which was that "The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares." App. to Pet. for Cert. 53a. Petitioners argue that statements of opinion or belief incorporating indefinite and unverifiable expressions cannot be actionable as misstatements of material fact within the meaning of Rule 14a–9, and that such a declaration of opinion or belief should never be actionable when placed in a proxy solicitation incorporating statements of fact sufficient to enable readers to draw their own, independent conclusions.

A

We consider first the actionability *per se* of statements of reasons, opinion, or belief. Because such a statement by definition purports to express what is consciously on the speaker's mind, we interpret the jury verdict as finding that the directors' statements of belief and opinion were made with knowledge that the directors did not hold the beliefs or opinions expressed, and we confine our discussion to statements so made.[5] That such statements may be materially significant raises no serious question. The meaning of the materiality requirement for liability under § 14(a) was discussed at some length in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438 (1976), where we held a fact to be material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.*, at 449. We think there is no room to deny that a statement of belief by corporate directors about a recommended course of action, or an explanation of their reasons for recommending

[5] In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 444, n. 7 (1976), we reserved the question whether scienter was necessary for liability generally under § 14(a). We reserve it still.

it, can take on just that importance. Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources, and the directors' perceived superiority is magnified even further by the common knowledge that state law customarily obliges them to exercise their judgment in the shareholders' interest. Cf. *Day* v. *Avery*, 179 U. S. App. D. C. 63, 71, 548 F. 2d 1018, 1026 (1976) (action for misrepresentation). Naturally, then, the shareowner faced with a proxy request will think it important to know the directors' beliefs about the course they recommend and their specific reasons for urging the stockholders to embrace it.

B

1

But, assuming materiality, the question remains whether statements of reasons, opinions, or beliefs are statements "with respect to . . . material fact[s]" so as to fall within the strictures of the Rule. Petitioners argue that we would invite wasteful litigation of amorphous issues outside the readily provable realm of fact if we were to recognize liability here on proof that the directors did not recommend the merger for the stated reason, and they cite the authority of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), in urging us to recognize sound policy grounds for placing such statements outside the scope of the Rule.

We agree that *Blue Chip Stamps* is instructive, as illustrating a line between what is and is not manageable in the litigation of facts, but do not read it as supporting petitioners' position. The issue in *Blue Chip Stamps* was the scope of the class of plaintiffs entitled to seek relief under an implied private cause of action for violating § 10(b) of the Act, prohibiting manipulation and deception in the purchase or sale of certain securities, contrary to Commission rules. This Court held against expanding the class from actual buyers and sellers to include those who rely on deceptive sales practices by taking no action, either to sell what they own or

to buy what they do not. We observed that actual sellers and buyers who sue for compensation must identify a specific number of shares bought or sold in order to calculate and limit any ensuing recovery. *Id.*, at 734. Recognizing liability to merely would-be investors, however, would have exposed the courts to litigation unconstrained by any such anchor in demonstrable fact, resting instead on a plaintiff's "subjective hypothesis" about the number of shares he would have sold or purchased. *Id.*, at 734–735. Hindsight's natural temptation to hypothesize boldness would have magnified the risk of nuisance litigation, which would have been compounded both by the opportunity to prolong discovery and by the capacity of claims resting on undocumented personal assertion to resist any resolution short of settlement or trial. Such were the premises of policy, added to those of textual analysis and precedent, on which *Blue Chip Stamps* deflected the threat of vexatious litigation over "many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony." *Id.*, at 743.

Attacks on the truth of directors' statements of reasons or belief, however, need carry no such threats. Such statements are factual in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the reason or belief expressed. In neither sense does the proof or disproof of such statements implicate the concerns expressed in *Blue Chip Stamps*. The root of those concerns was a plaintiff's capacity to manufacture claims of hypothetical action, unconstrained by independent evidence. Reasons for directors' recommendations or statements of belief are, in contrast, characteristically matters of corporate record subject to documentation, to be supported or attacked by evidence of historical fact outside a plaintiff's control. Such evidence would include not only corporate minutes and other statements of the directors themselves, but circumstantial evidence bearing on the facts that would reasonably underlie

the reasons claimed and the honesty of any statement that those reasons are the basis for a recommendation or other action, a point that becomes especially clear when the reasons or beliefs go to valuations in dollars and cents.

It is no answer to argue, as petitioners do, that the quoted statement on which liability was predicated did not express a reason in dollars and cents, but focused instead on the "indefinite and unverifiable" term, "high" value, much like the similar claim that the merger's terms were "fair" to shareholders.[6] The objection ignores the fact that such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading. Provable facts either furnish good reasons to make a conclusory commercial judgment, or they count against it, and expressions of such judgments can be uttered with knowledge of truth or falsity just like more definite statements, and defended or attacked through the orthodox evidentiary process that either substantiates their underlying justifications or tends to disprove their existence. In addressing the analogous issue in an action for misrepresentation, the court in *Day* v. *Avery*, 179 U. S. App. D. C. 63, 548 F. 2d 1018 (1976),

[6] Petitioners are also wrong to argue that construing the statute to allow recovery for a misleading statement that the merger was "fair" to the minority shareholders is tantamount to assuming federal authority to bar corporate transactions thought to be unfair to some group of shareholders. It is, of course, true that we said in *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 479 (1977), that "'[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation,'" quoting *Cort* v. *Ash*, 422 U. S. 66, 84 (1975). But § 14(a) does impose responsibility for false and misleading proxy statements. Although a corporate transaction's "fairness" is not, as such, a federal concern, a proxy statement's claim of fairness presupposes a factual integrity that federal law is expressly concerned to preserve. Cf. *Craftmatic Securities Litigation* v. *Kraftsow*, 890 F. 2d 628, 639 (CA3 1989).

for example, held that a statement by the executive committee of a law firm that no partner would be any "worse off" solely because of an impending merger could be found to be a material misrepresentation. *Id.*, at 70–72, 548 F. 2d, at 1025–1027. Cf. *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (CA2 1918) (L. Hand, J.) ("An opinion is a fact. . . . When the parties are so situated that the buyer may reasonably rely upon the expression of the seller's opinion, it is no excuse to give a false one"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 109, pp. 760–762 (5th ed. 1984). In this case, whether $42 was "high," and the proposal "fair" to the minority shareholders, depended on whether provable facts about the Bank's assets, and about actual and potential levels of operation, substantiated a value that was above, below, or more or less at the $42 figure, when assessed in accordance with recognized methods of valuation.

Respondents adduced evidence for just such facts in proving that the statement was misleading about its subject matter and a false expression of the directors' reasons. Whereas the proxy statement described the $42 price as offering a premium above both book value and market price, the evidence indicated that a calculation of the book figure based on the appreciated value of the Bank's real estate holdings eliminated any such premium. The evidence on the significance of market price showed that KBW had conceded that the market was closed, thin, and dominated by FABI, facts omitted from the statement. There was, indeed, evidence of a "going concern" value for the Bank in excess of $60 per share of common stock, another fact never disclosed. However conclusory the directors' statement may have been, then, it was open to attack by garden-variety evidence, subject neither to a plaintiff's control nor ready manufacture, and there was no undue risk of open-ended liability or uncontrollable litigation in allowing respondents the opportunity

for recovery on the allegation that it was misleading to call $42 "high."

This analysis comports with the holding that marked our nearest prior approach to the issue faced here, in *TSC Industries*, 426 U. S., at 454–455. There, to be sure, we reversed summary judgment for a *Borak* plaintiff who had sued on a description of proposed compensation for minority shareholders as offering a "substantial premium over current market values." But we held only that on the case's undisputed facts the conclusory adjective "substantial" was not materially misleading as a necessary matter of law, and our remand for trial assumed that such a description could be both materially misleading within the meaning of Rule 14a–9 and actionable under § 14(a). See *TSC Industries*, *supra*, at 458–460, 463–464.

2

Under § 14(a), then, a plaintiff is permitted to prove a specific statement of reason knowingly false or misleadingly incomplete, even when stated in conclusory terms. In reaching this conclusion we have considered statements of reasons of the sort exemplified here, which misstate the speaker's reasons and also mislead about the stated subject matter (*e. g.*, the value of the shares). A statement of belief may be open to objection only in the former respect, however, solely as a misstatement of the psychological fact of the speaker's belief in what he says. In this case, for example, the Court of Appeals alluded to just such limited falsity in observing that "the jury was certainly justified in believing that the directors did not believe a merger at $42 per share was in the minority stockholders' interest but, rather, that they voted as they did for other reasons, *e. g.*, retaining their seats on the board." 891 F. 2d, at 1121.

The question arises, then, whether disbelief, or undisclosed belief or motivation, standing alone, should be a sufficient basis to sustain an action under § 14(a), absent proof by the sort of objective evidence described above that the

statement also expressly or impliedly asserted something false or misleading about its subject matter. We think that proof of mere disbelief or belief undisclosed should not suffice for liability under § 14(a), and if nothing more had been required or proven in this case, we would reverse for that reason.

On the one hand, it would be rare to find a case with evidence solely of disbelief or undisclosed motivation without further proof that the statement was defective as to its subject matter. While we certainly would not hold a director's naked admission of disbelief incompetent evidence of a proxy statement's false or misleading character, such an unusual admission will not very often stand alone, and we do not substantially narrow the cause of action by requiring a plaintiff to demonstrate something false or misleading in what the statement expressly or impliedly declared about its subject.

On the other hand, to recognize liability on mere disbelief or undisclosed motive without any demonstration that the proxy statement was false or misleading about its subject would authorize § 14(a) litigation confined solely to what one skeptical court spoke of as the "impurities" of a director's "unclean heart." *Stedman* v. *Storer*, 308 F. Supp. 881, 887 (SDNY 1969) (dealing with § 10(b)). This, we think, would cross the line that *Blue Chip Stamps* sought to draw. While it is true that the liability, if recognized, would rest on an actual, not hypothetical, psychological fact, the temptation to rest an otherwise nonexistent § 14(a) action on psychological enquiry alone would threaten just the sort of strike suits and attrition by discovery that *Blue Chip Stamps* sought to discourage. We therefore hold disbelief or undisclosed motivation, standing alone, insufficient to satisfy the element of fact that must be established under § 14(a).

C

Petitioners' fall-back position assumes the same relationship between a conclusory judgment and its underlying facts

that we described in Part II–B–1, *supra*. Thus, citing *Radol* v. *Thomas*, 534 F. Supp. 1302, 1315, 1316 (SD Ohio 1982), petitioners argue that even if conclusory statements of reason or belief can be actionable under § 14(a), we should confine liability to instances where the proxy material fails to disclose the offending statement's factual basis. There would be no justification for holding the shareholders entitled to judicial relief, that is, when they were given evidence that a stated reason for a proxy recommendation was misleading and an opportunity to draw that conclusion themselves.

The answer to this argument rests on the difference between a merely misleading statement and one that is materially so. While a misleading statement will not always lose its deceptive edge simply by joinder with others that are true, the true statements may discredit the other one so obviously that the risk of real deception drops to nil. Since liability under § 14(a) must rest not only on deceptiveness but materiality as well (*i. e.*, it has to be significant enough to be important to a reasonable investor deciding how to vote, see *TSC Industries*, 426 U. S., at 449), petitioners are on perfectly firm ground insofar as they argue that publishing accurate facts in a proxy statement can render a misleading proposition too unimportant to ground liability.

But not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow. *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F. 2d 1281, 1297 (CA2 1973) ("[I]t is not sufficient that overtones might have been picked up by the sensitive antennae of investment analysts"). Cf. *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 18–19 (1990) (a defamatory assessment of facts can be actionable even if the facts underlying the assessment are accurately presented). The point of a proxy statement, after all, should be to inform, not to challenge the reader's critical wits. Only when the inconsistency would exhaust the misleading conclu-

sion's capacity to influence the reasonable shareholder would a § 14(a) action fail on the element of materiality.

Suffice it to say that the evidence invoked by petitioners in the instant case fell short of compelling the jury to find the facial materiality of the misleading statement neutralized. The directors claim, for example, to have made an explanatory disclosure of further reasons for their recommendation when they said they would keep their seats following the merger, but they failed to mention what at least one of them admitted in testimony, that they would have had no expectation of doing so without supporting the proposal, App. 281–282.[7] And although the proxy statement did speak factually about the merger price in describing it as higher than share prices in recent sales, it failed even to mention the closed market dominated by FABI. None of these disclosures that the directors point to was, then, anything more than a half-truth, and the record shows that another fact statement they invoke was arguably even worse. The claim that the merger price exceeded book value was controverted, as we have seen already, by evidence of a higher book value than the directors conceded, reflecting appreciation in the Bank's real estate portfolio. Finally, the solicitation omitted any mention of the Bank's value as a going concern at more than $60 a share, as against the merger price of $42. There was, in sum, no more of a compelling case for the statement's immateriality than for its accuracy.

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[7] Petitioners fail to dissuade us from recognizing the significance of omissions such as this by arguing that we effectively require them to accuse themselves of breach of fiduciary duty. Subjection to liability for misleading others does not raise a duty of self-accusation; it enforces a duty to refrain from misleading. We have no occasion to decide whether the directors were obligated to state the reasons for their support of the merger proposal here, but there can be no question that the statement they did make carried with it no option to deceive. Cf. *Berg* v. *First American Bankshares, Inc.*, 254 U. S. App. D. C. 198, 205, 796 F. 2d 489, 496 (1986) ("Once the proxy statement purported to disclose the factors considered . . . , there was an obligation to portray them accurately").

III

The second issue before us, left open in *Mills* v. *Electric Auto-Lite Co.*, 396 U. S., at 385, n. 7, is whether causation of damages compensable through the implied private right of action under § 14(a) can be demonstrated by a member of a class of minority shareholders whose votes are not required by law or corporate bylaw to authorize the transaction giving rise to the claim.[8] *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), did not itself address the requisites of causation, as such, or define the class of plaintiffs eligible to sue under § 14(a). But its general holding, that a private cause of action was available to some shareholder class, acquired greater clarity with a more definite concept of causation in *Mills*, where we addressed the sufficiency of proof that misstatements in a proxy solicitation were responsible for damages claimed from the merger subject to complaint.

Although a majority stockholder in *Mills* controlled just over half the corporation's shares, a two-thirds vote was needed to approve the merger proposal. After proxies had been obtained, and the merger had carried, minority shareholders brought a *Borak* action. *Mills*, 396 U. S., at 379. The question arose whether the plaintiffs' burden to demonstrate causation of their damages traceable to the § 14(a) violation required proof that the defect in the proxy solicitation had had "a decisive effect on the voting." *Id.*, at 385. The *Mills* Court avoided the evidentiary morass that would have

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[8] Respondents argue that this issue was not raised below. The Appeals Court, however, addressed the availability of a right of action to minority shareholders in respondents' circumstances and concluded that respondents were entitled to sue. 891 F. 2d 1112, 1120–1121 (CA4 1989). It suffices for our purposes that the court below passed on the issue presented, *Stevens* v. *Department of Treasury*, 500 U. S. 1, 8 (1991); cf. *Cohen* v. *Cowles Media Co.*, *ante*, at 667–668, particularly where the issue is, we believe, "'in a state of evolving definition and uncertainty,'" *St. Louis* v. *Praprotnik*, 485 U. S. 112, 120 (1988) (plurality opinion), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 256 (1981), and one of importance to the administration of federal law. *Praprotnik*, *supra*, at 120–121.

followed from requiring individualized proof that enough minority shareholders had relied upon the misstatements to swing the vote. Instead, it held that causation of damages by a material proxy misstatement could be established by showing that minority proxies necessary and sufficient to authorize the corporate acts had been given in accordance with the tenor of the solicitation, and the Court described such a causal relationship by calling the proxy solicitation an "essential link in the accomplishment of the transaction." *Ibid.* In the case before it, the Court found the solicitation essential, as contrasted with one addressed to a class of minority shareholders without votes required by law or bylaw to authorize the action proposed, and left it for another day to decide whether such a minority shareholder could demonstrate causation. *Id.*, at 385, n. 7.

In this case, respondents address *Mills'* open question by proffering two theories that the proxy solicitation addressed to them was an "essential link" under the *Mills* causation test.[9] They argue, first, that a link existed and was essential simply because VBI and FABI would have been unwilling to proceed with the merger without the approval manifested by the minority shareholders' proxies, which would not have been obtained without the solicitation's express mis-

[9] Citing the decision in *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F. 2d 374, 382–383 (CA2 1974), petitioners characterize respondents' proffered theories as examples of so-called "sue facts" and "shame facts" theories. Brief for Petitioners 41; Reply Brief for Petitioners 8. "A 'sue fact' is, in general, a fact which is material to a sue decision. A 'sue decision' is a decision by a shareholder whether or not to institute a representative or derivative suit alleging a state-law cause of action." Gelb, Rule 10b–5 and *Santa Fe*—Herein of Sue Facts, Shame Facts, and Other Matters, 87 W. Va. L. Rev. 189, 198, and n. 52 (1985), quoting Borden, "Sue Fact" Rule Mandates Disclosure to Avoid Litigation in State Courts, 10 SEC '82, pp. 201, 204–205 (1982). See also Note, Causation and Liability in Private Actions for Proxy Violations, 80 Yale L. J. 107, 116 (1970) (discussing theories of causation). "Shame facts" are said to be facts which, had they been disclosed, would have "shamed" management into abandoning a proposed transaction. See *Schlick*, *supra*, at 384. See also Gelb, *supra*, at 197.

statements and misleading omissions. On this reasoning, the causal connection would depend on a desire to avoid bad shareholder or public relations, and the essential character of the causal link would stem not from the enforceable terms of the parties' corporate relationship, but from one party's apprehension of the ill will of the other.

In the alternative, respondents argue that the proxy statement was an essential link between the directors' proposal and the merger because it was the means to satisfy a state statutory requirement of minority shareholder approval, as a condition for saving the merger from voidability resulting from a conflict of interest on the part of one of the Bank's directors, Jack Beddow, who voted in favor of the merger while also serving as a director of FABI. Brief for Respondents 43–44, 45–46. Under the terms of Va. Code Ann. § 13.1–691(A) (1989), minority approval after disclosure of the material facts about the transaction and the director's interest was one of three avenues to insulate the merger from later attack for conflict, the two others being ratification by the Bank's directors after like disclosure and proof that the merger was fair to the corporation. On this theory, causation would depend on the use of the proxy statement for the purpose of obtaining votes sufficient to bar a minority shareholder from commencing proceedings to declare the merger void.[10]

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[10] The District Court and Court of Appeals have grounded causation on a further theory, that Virginia law required a solicitation of proxies even from minority shareholders as a condition of consummating the merger. See 891 F. 2d, at 1120, n. 1; App. 426. While the provisions of Va. Code Ann. §§ 13.1–718(A), (D), and (E) (1989) are said to have required the Bank to solicit minority proxies, they actually compelled no more than submission of the merger to a vote at a shareholders' meeting, § 13.1–718(E), preceded by issuance of an informational statement, § 13.1–718(D). There was thus no need under this statute to solicit proxies, although it is undisputed that the proxy solicitation sufficed to satisfy the statutory obligation to provide a statement of relevant information. On this theory causation would depend on the use of the proxy statement to satisfy a statutory ob-

Although respondents have proffered each of these theories as establishing a chain of causal connection in which the proxy statement is claimed to have been an "essential link," neither theory presents the proxy solicitation as essential in the sense of *Mills*' causal sequence, in which the solicitation links a directors' proposal with the votes legally required to authorize the action proposed. As a consequence, each theory would, if adopted, extend the scope of *Borak* actions beyond the ambit of *Mills* and expand the class of plaintiffs entitled to bring *Borak* actions to include shareholders whose initial authorization of the transaction prompting the proxy solicitation is unnecessary.

Assessing the legitimacy of any such extension or expansion calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute, the first of which was not, in fact, the considered focus of the *Borak* opinion. The rule that has emerged in the years since *Borak* and *Mills* came down is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy, *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575 (1979). From this the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended.

This rule and corollary present respondents with a serious obstacle, for we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as respondents' theory of causation would entail. At first blush, it might seem otherwise, for the *Borak* Court certainly did not ignore the matter of intent. Its opinion adverted to the statutory object of "protection of investors" as animating Congress' intent to provide judicial relief where "necessary," 377 U. S., at 432, and it quoted evidence for that intent from House and Senate Committee Reports, *id.*, at 431–432.

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ligation, even though a proxy solicitation was not, as such, required. In this Court, respondents have disclaimed reliance on any such theory.

Borak's probe of the congressional mind, however, never focused squarely on private rights of action, as distinct from the substantive objects of the legislation, and one Member of the *Borak* Court later characterized the "implication" of the private right of action as resting modestly on the Act's "'exclusively procedural provision' affording access to a federal forum." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 403, n. 4 (1971) (Harlan, J., concurring in judgment) (internal quotation marks omitted). See generally L. Loss, Fundamentals of Securities Regulation 929 (2d ed. 1988). See also *Touche Ross*, *supra*, at 568, 578. In fact, the importance of enquiring specifically into intent to authorize a private cause of action became clear only later, see *Cort* v. *Ash*, 422 U. S., at 78, and only later still, in *Touche Ross*, was this intent accorded primacy among the considerations that might be thought to bear on any decision to recognize a private remedy. There, in dealing with a claimed private right under § 17(a) of the Act, we explained that the "central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." 442 U. S., at 575–576.

Looking to the Act's text and legislative history mindful of this heightened concern reveals little that would help toward understanding the intended scope of any private right. According to the House Report, Congress meant to promote the "free exercise" of stockholders' voting rights, H. R. Rep. No. 1383, 73d Cong., 2d Sess., 14 (1934), and protect "[f]air corporate suffrage," *id.*, at 13, from abuses exemplified by proxy solicitations that concealed what the Senate Report called the "real nature" of the issues to be settled by the subsequent votes, S. Rep. No. 792, 73d Cong., 2d Sess., 12 (1934). While it is true that these Reports, like the language of the Act itself, carry the clear message that Congress meant to protect investors from misinformation that rendered them unwitting agents of self-inflicted damage, it is just as true that Congress was reticent with indications of

how far this protection might depend on self-help by private action. The response to this reticence may be, of course, to claim that § 14(a) cannot be enforced effectively for the sake of its intended beneficiaries without their participation as private litigants. *Borak*, *supra*, at 432. But the force of this argument for inferred congressional intent depends on the degree of need perceived by Congress, and we would have trouble inferring any congressional urgency to depend on implied private actions to deter violations of § 14(a), when Congress expressly provided private rights of action in §§ 9(e), 16(b), and 18(a) of the same Act. See 15 U. S. C. §§ 78i(e), 78p(b), and 78r(a).[11]

The congressional silence that is thus a serious obstacle to the expansion of cognizable *Borak* causation is not, however, a necessarily insurmountable barrier. This is not the first effort in recent years to expand the scope of an action originally inferred from the Act without "conclusive guidance" from Congress, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 737, and we may look to that earlier case for the proper response to such a plea for expansion. There, we accepted the proposition that where a legal structure of private statutory rights has developed without clear indications of congressional intent, the contours of that structure need not be frozen absolutely when the result would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized. Faced in that case with such a claim for equality in rounding out the scope of an implied private statutory right of action, we looked to policy reasons for deciding where the outer limits of

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[11] The object of our enquiry does not extend further to question the holding of either *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), or *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), at this date, any more than we have done so in the past, see *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 577 (1979). Our point is simply to recognize the hurdle facing any litigant who urges us to enlarge the scope of the action beyond the point reached in *Mills*.

the right should lie. We may do no less here, in the face of respondents' pleas for a private remedy to place them on the same footing as shareholders with votes necessary for initial corporate action.

A

Blue Chip Stamps set an example worth recalling as a preface to specific policy analysis of the consequences of recognizing respondents' first theory, that a desire to avoid minority shareholders' ill will should suffice to justify recognizing the requisite causality of a proxy statement needed to garner that minority support. It will be recalled that in *Blue Chip Stamps* we raised concerns about the practical consequences of allowing recovery, under § 10(b) of the Act and Rule 10b–5, on evidence of what a merely hypothetical buyer or seller might have done on a set of facts that never occurred, and foresaw that any such expanded liability would turn on "hazy" issues inviting self-serving testimony, strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process. *Id.*, at 742–743. These were good reasons to deny recognition to such claims in the absence of any apparent contrary congressional intent.

The same threats of speculative claims and procedural intractability are inherent in respondents' theory of causation linked through the directors' desire for a cosmetic vote. Causation would turn on inferences about what the corporate directors would have thought and done without the minority shareholder approval unneeded to authorize action. A subsequently dissatisfied minority shareholder would have virtual license to allege that managerial timidity would have doomed corporate action but for the ostensible approval induced by a misleading statement, and opposing claims of hypothetical diffidence and hypothetical boldness on the part of directors would probably provide enough depositions in the usual case to preclude any judicial resolution short of the credibility judgments that can only come after trial. Reliable evidence would seldom exist. Directors would under-

stand the prudence of making a few statements about plans to proceed even without minority endorsement, and discovery would be a quest for recollections of oral conversations at odds with the official pronouncements, in hopes of finding support for *ex post facto* guesses about how much heat the directors would have stood in the absence of minority approval. The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory of causation that raised such prospects, and we reject this one.[12]

B

The theory of causal necessity derived from the requirements of Virginia law dealing with postmerger ratification seeks to identify the essential character of the proxy solicitation from its function in obtaining the minority approval that would preclude a minority suit attacking the merger. Since the link is said to be a step in the process of barring a class of shareholders from resort to a state remedy otherwise available, this theory of causation rests upon the proposition of policy that § 14(a) should provide a federal remedy whenever a false or misleading proxy statement results in the loss under state law of a shareholder plaintiff's state remedy for

[12] In parting company from us on this point, JUSTICE KENNEDY emphasizes that respondents in this particular case substantiated a plausible claim that petitioners would not have proceeded without minority approval. FABI's attempted freeze-out merger of a Maryland subsidiary had failed a year before the events in question when the subsidiary's directors rejected the proposal because of inadequate share price, and there was evidence of FABI's desire to avoid any renewal of adverse comment. The issue before us, however, is whether to recognize a theory of causation generally, and our decision against doing so rests on our apprehension that the ensuing litigation would be exemplified by cases far less tractable than this. Respondents' burden to justify recognition of causation beyond the scope of *Mills* must be addressed not by emphasizing the instant case but by confronting the risk inherent in the cases that could be expected to be characteristic if the causal theory were adopted.

the enforcement of a state right. Respondents agree with the suggestions of counsel for the SEC and FDIC that causation be recognized, for example, when a minority shareholder has been induced by a misleading proxy statement to forfeit a state-law right to an appraisal remedy by voting to approve a transaction, cf. *Swanson* v. *American Consumers Industries, Inc.*, 475 F. 2d 516, 520–521 (CA7 1973), or when such a shareholder has been deterred from obtaining an order enjoining a damaging transaction by a proxy solicitation that misrepresents the facts on which an injunction could properly have been issued. Cf. *Healey* v. *Catalyst Recovery of Pennsylvania, Inc.*, 616 F. 2d 641, 647–648 (CA3 1980); *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F. 2d 602, 614 (CA5 1979), cert. denied, 449 U. S. 820 (1980). Respondents claim that in this case a predicate for recognizing just such a causal link exists in Va. Code Ann. § 13.1–691(A)(2) (1989), which sets the conditions under which the merger may be insulated from suit by a minority shareholder seeking to void it on account of Beddow's conflict.

This case does not, however, require us to decide whether §14(a) provides a cause of action for lost state remedies, since there is no indication in the law or facts before us that the proxy solicitation resulted in any such loss. The contrary appears to be the case. Assuming the soundness of respondents' characterization of the proxy statement as materially misleading, the very terms of the Virginia statute indicate that a favorable minority vote induced by the solicitation would not suffice to render the merger invulnerable to later attack on the ground of the conflict. The statute bars a shareholder from seeking to avoid a transaction tainted by a director's conflict if, *inter alia*, the minority shareholders ratified the transaction following disclosure of the material facts of the transaction and the conflict. Va. Code Ann.

§ 13.1–691(A)(2) (1989). Assuming that the material facts about the merger and Beddow's interests were not accurately disclosed, the minority votes were inadequate to ratify the merger under state law, and there was no loss of state remedy to connect the proxy solicitation with harm to minority shareholders irredressable under state law.[13] Nor is there a claim here that the statement misled respondents into entertaining a false belief that they had no chance to upset the merger until the time for bringing suit had run out.[14]

IV

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I

As I understand the Court's opinion, the statement "In the opinion of the Directors, this is a high value for the shares"

[13] In his opinion dissenting on this point, JUSTICE KENNEDY suggests that materiality under Virginia law might be defined differently from the materiality standard of our own cases, resulting in a denial of state remedy even when a solicitation was materially misleading under federal law. Respondents, however, present nothing to suggest that this might be so.

[14] Respondents do not claim that any other application of a theory of lost state remedies would avail them here. It is clear, for example, that no state appraisal remedy was lost through a § 14(a) violation in this case. Respondent Weinstein and others did seek appraisal under Virginia law in the Virginia courts; their claims were rejected on the explicit grounds that although "[s]tatutory appraisal is now considered the exclusive remedy for stockholders opposing a merger," App. to Pet. for Cert. 32a; see *Adams* v. *United States Distributing Corp.*, 184 Va. 134, 34 S. E. 2d 244 (1945), cert. denied, 327 U. S. 788 (1946), "dissenting stockholders in bank mergers do not even have this solitary remedy available to them," because "Va. Code § 6.1–43 specifically excludes bank mergers from application of § 13.1–730 [the Virginia appraisal statute]." App. to Pet. for Cert. 31a, 32a. Weinstein does not claim that the Virginia court was wrong and does not rely on this claim in any way. Thus, the § 14(a) violation could have had no effect on the availability of an appraisal remedy, for there never was one.

would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise. The statement "The directors voted to accept the proposal *because* they believe it offers a high value" would not produce liability if in fact the directors' genuine motive was quite different—except that it would produce liability if the proposal in fact did not offer a high value and the directors knew that.

I agree with all of this. However, not every sentence that has the word "opinion" in it, or that refers to motivation for directors' actions, leads us into this psychic thicket. Sometimes such a sentence actually represents facts as facts rather than opinions—and in that event no more need be done than apply the normal rules for § 14(a) liability. I think that is the situation here. In my view, the statement at issue in this case is most fairly read as affirming *separately* both the fact of the directors' opinion *and* the accuracy of the facts upon which the opinion was assertedly based. It reads as follows:

> "The Plan of Merger has been approved by the Board of Directors because it provides an opportunity for the Bank's public shareholders to achieve a high value for their shares." App. to Pet. for Cert. 53a.

Had it read "because *in their estimation* it provides an opportunity, etc.," it would have set forth nothing but an opinion. As written, however, it asserts both that the board of directors acted for a particular reason *and* that that reason is correct. This interpretation is made clear by what immediately follows: "The price to be paid is about 30% higher than the [last traded price immediately before announcement of the proposal] . . . . [T]he $42 per share that will be paid to public holders of the common stock represents a premium of approximately 26% over the book value . . . . [T]he bank earned $24,767,000 in the year ended December 31, 1986 . . . ." *Id.*, at 53a–54a. These are all facts that sup-

port—and that are obviously introduced for the *purpose* of supporting—the factual truth of the "because" clause, *i. e.*, that the proposal gives shareholders a "high value."

If the present case were to proceed, therefore, I think the normal § 14(a) principles governing misrepresentation of fact would apply.

II

I recognize that the Court's disallowance (in Part II–B–2) of an action for misrepresentation of belief is entirely contrary to the modern law of torts, as authorities cited by the Court make plain. See *Vulcan Metals Co.* v. *Simmons Mfg. Co.*, 248 F. 853, 856 (CA2 1918); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 109 (5th ed. 1984), cited *ante*, at 1094. I have no problem with departing from modern tort law in this regard, because I think the federal cause of action at issue here was never enacted by Congress, see *Thompson* v. *Thompson*, 484 U. S. 174, 190–192 (1988) (SCALIA, J., concurring in judgment), and hence the more narrow we make it (within the bounds of rationality) the more faithful we are to our task.

* * *

I concur in the judgment of the Court, and join all of its opinion except Part II.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

While I agree in substance with Parts I and II of the Court's opinion, I do not agree with the reasoning in Part III.

In *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), the Court held that a finding that the terms of a merger were fair could not constitute a defense by the corporation to a shareholder action alleging that the merger had been accomplished by using a misleading proxy statement. The fairness of the transaction was, according to *Mills*, a matter to be considered at the remedy stage of the litigation.

On the question of the causal connection between the proxy solicitation and the harm to the plaintiff shareholders, the Court had this to say:

> "There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions. Cf. *Union Pac. R. Co.* v. *Chicago & N. W. R. Co.*, 226 F. Supp. 400, 411 (D. C. N. D. Ill. 1964); 2 L. Loss, Securities Regulation 962 n. 411 (2d ed. 1961); 5 *id.*, at 2929–2930 (Supp. 1969)." *Id.*, at 384–385.

Justice Harlan writing for the Court then appended this footnote:

> "We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement, see

Laurenzano v. *Einbender*, 264 F. Supp. 356 (D. C. E. D. N. Y. 1966) . . . ." *Id.*, at 385, n. 7.

The case before us today involves a merger that has been found by a jury to be unfair, not fair. The interest in providing a remedy to the injured minority shareholders therefore is stronger, not weaker, than in *Mills*. The interest in avoiding speculative controversy about the actual importance of the proxy solicitation is the same as in *Mills*. Moreover, as in *Mills*, these matters can be taken into account at the remedy stage in appropriate cases. Accordingly, I do not believe that it constitutes an unwarranted extension of the rationale of *Mills* to conclude that because management found it necessary—whether for "legal or practical reasons"—to solicit proxies from minority shareholders to obtain their approval of the merger, that solicitation "was an essential link in the accomplishment of the transaction." *Id.*, at 385, and n. 7. In my opinion, shareholders may bring an action for damages under § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n(a), whenever materially false or misleading statements are made in proxy statements. That the solicitation of proxies is not required by law or by the bylaws of a corporation does not authorize corporate officers, once they have decided for whatever reason to solicit proxies, to avoid the constraints of the statute. I would therefore affirm the judgment of the Court of Appeals.

JUSTICE KENNEDY, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part and dissenting in part.

I am in general agreement with Parts I and II of the majority opinion, but do not agree with the views expressed in Part III regarding the proof of causation required to establish a violation of § 14(a). With respect, I dissent from Part III of the Court's opinion.

I

Review of the jury's finding on causation is complicated because the distinction between reliance and causation was not addressed in explicit terms in the earlier stages of this litigation. Petitioners, in effect, though, recognized the distinction when they accepted the District Court's essential link instruction as to reliance but not as to causation. So I agree with the Court that the issue has been preserved for our review here.*

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*In the District Court, petitioners asked for jury instructions requiring respondent Sandberg to prove *causation* as an element of her cause of action. App. 83, 92. The District Court gave an instruction close in substance to those requested:

"The fourth element under Count I that Ms. Sandberg must establish is that the conduct of the defendants proximately caused the damage to the plaintiff. In order for an act or omission to be considered a proximate cause of damage, it must be a substantial factor in causing the damage, and the damage must either have been a direct result or a reasonably probable consequence of the act or omission.

"In order to satisfy this element, the plaintiff need not prove that the defendants' conduct was the only cause of the plaintiff's damage. It is sufficient if you find that the actions of the defendants were a substantial and significant contributing cause to the damage which the plaintiff asserts she suffered." *Id.*, at 424.

The District Court also gave a jury instruction on reliance, *i. e.*, did Sandberg actually read the proxy statement and rely upon the misstatements or omissions. Here, the District Court gave Sandberg's proposed Instruction No. 29, which indicated that it was not necessary for Sandberg to "establish a separate showing of reliance by her on the material misstatement or omissions if any in the proxy statement." *Id.*, at 426. The instruction continued, in a manner the Court finds problematic, to provide: "If you find that there are omissions or misstatements in the proxy statement, and that these omissions or misstatements are material, a shareholder such as Ms. Sandberg has made a sufficient showing of a causal relation between the violation and the injury for which she seeks redress if she proves that the proxy solicitation itself rather than the particular defect in the solicitation material was an essential link in the accomplishment of the transaction.

"If you find that it was necessary for the bank to solicit proxies from minority shareholders in order to proceed with the merger, you may find that

The Court of Appeals considered the essential link presumption in rejecting petitioners' argument that Sandberg must show reliance by demonstrating that she read the proxy and then voted in favor of the proposal or took some other specific action in reliance upon it. In the Court of Appeals, the parties did not brief, nor did the panel address, the possibility that nonvoting causation theories would suffice to allow for recovery.

Before this Court petitioners do not argue that Sandberg must demonstrate reliance on her part or on the part of other shareholders. The matter of causation, however, must be addressed.

II

A

The severe limits the Court places upon possible proof of nonvoting causation in a § 14(a) private action are justified neither by our precedents nor by any case in the courts of appeals. These limits are said to flow from a shift in our approach to implied causes of action that has occurred since we recognized the § 14(a) implied private action in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). *Ante*, at 1102–1105.

I acknowledge that we should exercise caution in creating implied private rights of action and that we must respect the primacy of congressional intent in that inquiry. See *ante*, at 1102. Where an implied cause of action is well accepted by our own cases and has become an established part of the securities laws, however, we should enforce it as a meaningful remedy unless we are to eliminate it altogether. As the

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the proxy solicitation was an essential link in the accomplishment of the transaction.

". . . you are instructed it is no defense that the votes of the minority stockholders were not needed to approve the transaction." *Id.*, at 426–427.

Petitioners objected to the "essential link" jury instruction upon the ground that it decided the question left open in footnote 7 of *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 385 (1970), App. 435.

Court phrases it, we must consider the causation question in light of the underlying "policy reasons for deciding where the outer limits of the right should lie." *Ante*, at 1104–1105; see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975).

According to the Court, acceptance of nonvoting causation theories would "extend the scope of *Borak* actions beyond the ambit of *Mills*." *Ante*, at 1102. But *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), did not purport to limit the scope of *Borak* actions, and as footnote 7 of *Mills* indicates, some courts have applied nonvoting causation theories to *Borak* actions for at least the past 25 years. See also L. Loss, Fundamentals of Securities Regulation 948, n. 81 (2d ed. 1988).

To the extent the Court's analysis considers the purposes underlying § 14(a), it does so with the avowed aim to limit the cause of action and with undue emphasis upon fears of "speculative claims and procedural intractability." *Ante*, at 1105. The result is a sort of guerrilla warfare to restrict a well-established implied right of action. If the analysis adopted by the Court today is any guide, Congress and those charged with enforcement of the securities laws stand forewarned that unresolved questions concerning the scope of those causes of action are likely to be answered by the Court in favor of defendants.

B

The Court seems to assume, based upon the footnote in *Mills* reserving the question, that Sandberg bears a special burden to demonstrate causation because the public shareholders held only 15 percent of the stock of First American Bank of Virginia (Bank). JUSTICE STEVENS is right to reject this theory. Here, First American Bankshares, Inc. (FABI), and Virginia Bankshares, Inc. (VBI), retained the option to back out of the transaction if dissatisfied with the reaction of the minority shareholders, or if concerned that the merger would result in liability for violation of duties to the minority shareholders. The merger agreement was con-

ditioned upon approval by two-thirds of the shareholders, App. 463, and VBI could have voted its shares against the merger if it so decided. To this extent, the Court's distinction between cases where the "minority" shareholders could have voted down the transaction and those where causation must be proved by nonvoting theories is suspect. Minority shareholders are identified only by a *post hoc* inquiry. The real question ought to be whether an injury was shown by the effect the nondisclosure had on the entire merger process, including the period before votes are cast.

The Court's distinction presumes that a majority shareholder will vote in favor of management's proposal even if proxy disclosure suggests that the transaction is unfair to minority shareholders or that the board of directors or majority shareholder is in breach of fiduciary duties to the minority. If the majority shareholder votes against the transaction in order to comply with its state-law duties, or out of fear of liability, or upon concluding that the transaction will injure the reputation of the business, this ought not to be characterized as nonvoting causation. Of course, when the majority shareholder dominates the voting process, as was the case here, it may prefer to avoid the embarrassment of voting against its own proposal and so may cancel the meeting of shareholders at which the vote was to have been taken. For practical purposes, the result is the same: Because of full disclosure the transaction does not go forward and the resulting injury to minority shareholders is avoided. The Court's distinction between voting and nonvoting causation does not create clear legal categories.

III

Our decision in *Mills* v. *Electric Auto-Lite Co.*, *supra*, at 385, rested upon the impracticality of attempting to determine the extent of reliance by thousands of shareholders on alleged misrepresentations or omissions. A misstatement or an omission in a proxy statement does not violate § 14(a) un-

less "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976). If minority shareholders hold sufficient votes to defeat a management proposal and if the misstatement or omission is likely to be considered important in deciding how to vote, then there exists a likely causal link between the proxy violation and the enactment of the proposal; and one can justify recovery by minority shareholders for damages resulting from enactment of management's proposal.

If, for sake of argument, we accept a distinction between voting and nonvoting causation, we must determine whether the *Mills* essential link theory applies where a majority shareholder holds sufficient votes to force adoption of a proposal. The merit of the essential link formulation is that it rests upon the likelihood of causation and eliminates the difficulty of proof. Even where a minority lacks votes to defeat a proposal, both these factors weigh in favor of finding causation so long as the solicitation of proxies is an essential link in the transaction.

A

The Court argues that a nonvoting causation theory would "turn on 'hazy' issues inviting self-serving testimony, strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process." *Ante*, at 1105 (citing *Blue Chip Stamps*, 421 U. S., at 742–743). The Court's description does not fit this case and is not a sound objection in any event. Any causation inquiry under § 14(a) requires a court to consider a hypothetical universe in which adequate disclosure is made. Indeed, the analysis is inevitable in almost any suit when we are invited to compare what was with what ought to have been. The causation inquiry is not intractable. On balance, I am convinced that the likelihood that causation exists supports elimination of any requirement that the plaintiff prove the material misstatement or omission caused the transaction to go forward when it otherwise would

have been halted or voted down. This is the usual rule under *Mills*, and the difficulties of proving or disproving causation are, if anything, greater where the minority lacks sufficient votes to defeat the proposal. A presumption will assist courts in managing a circumstance in which direct proof is rendered difficult. See *Basic Inc.* v. *Levinson*, 485 U. S. 224, 245 (1988) (discussing presumptions in securities law).

B

There is no authority whatsoever for limiting § 14(a) to protecting those minority shareholders whose numerical strength could permit them to vote down a proposal. One of § 14(a)'s "chief purposes is 'the protection of investors.'" *J. I. Case Co.* v. *Borak*, 377 U. S., at 432. Those who lack the strength to vote down a proposal have all the more need of disclosure. The voting process involves not only casting ballots but also the formulation and withdrawal of proposals, the minority's right to block a vote through court action or the threat of adverse consequences, or the negotiation of an increase in price. The proxy rules support this deliberative process. These practicalities can result in causation sufficient to support recovery.

The facts in the case before us prove this point. Sandberg argues that had all the material facts been disclosed, FABI or the Bank likely would have withdrawn or revised the merger proposal. The evidence in the record, and more that might be available upon remand, see *infra*, at 1120, meets any reasonable requirement of specific and nonspeculative proof.

FABI wanted a "friendly transaction" with a price viewed as "so high that any reasonable shareholder will accept it." App. 99. Management expressed concern that the transaction result in "no loss of support for the bank out in the community, which was important." *Id.*, at 109. Although FABI had the votes to push through any proposal, it wanted a favorable response from the minority shareholders. *Id.*, at 192. Because of the "human element involved in a transac-

tion of this nature," FABI attempted to "show those minority shareholders that [it was] being fair." *Id.*, at 347.

The theory that FABI would not have pursued the transaction if full disclosure had been provided and the shareholders had realized the inadequacy of the price is supported not only by the trial testimony but also by notes of the meeting of the Bank's board, which approved the merger. The inquiry into causation can proceed not by "opposing claims of hypothetical diffidence and hypothetical boldness," *ante*, at 1105, but through an examination of evidence of the same type the Court finds acceptable in its determination that directors' statements of reasons can lead to liability. Discussion at the board meeting focused upon matters such as "how to keep PR afloat" and "how to prevent adverse reac[tion]/perception," App. 454, demonstrating the directors' concern that an unpopular merger proposal could injure the Bank.

Only a year or so before the Virginia merger, FABI had failed in an almost identical transaction, an attempt to freeze out the minority shareholders of its Maryland subsidiary. FABI retained Keefe, Bruyette & Woods (KBW) for that transaction as well, and KBW had given an opinion that FABI's price was fair. The subsidiary's board of directors then retained its own adviser and concluded that the price offered by FABI was inadequate. *Id.*, at 297, 319. The Maryland transaction failed when the directors of the Maryland bank refused to proceed; and this was despite the minority's inability to outvote FABI if it had pressed on with the deal.

In the Virginia transaction, FABI again decided to retain KBW. Beddow, who sat on the boards of both FABI and the Bank, discouraged the Bank from hiring its own financial adviser, out of fear that the Maryland experience would be repeated if the Bank received independent advice. Directors of the Bank testified they would not have voted to approve the transaction if the price had been demonstrated unfair to the minority. Further, approval by the Bank's

board of directors was facilitated by FABI's representation that the transaction also would be approved by the minority shareholders.

These facts alone suffice to support a finding of causation, but here Sandberg might have had yet more evidence to link the nondisclosure with completion of the merger. FABI executive Robert Altman and Bank Chairman Drewer met on the day before the shareholders meeting when the vote was taken. Notes produced by petitioners suggested that Drewer, who had received some shareholder objections to the $42 price, considered postponing the meeting and obtaining independent advice on valuation. Altman persuaded him to go forward without any of these cautionary measures. This information, which was produced in the course of discovery, was kept from the jury on grounds of privilege. Sandberg attacked the privilege ruling on five grounds in the Court of Appeals. In light of its ruling in favor of Sandberg, however, the panel had no occasion to consider the admissibility of this evidence.

Though I would not require a shareholder to present such evidence of causation, this case itself demonstrates that nonvoting causation theories are quite plausible where the misstatement or omission is material and the damages sustained by minority shareholders is serious. As Professor Loss summarized the holdings of a "substantial number of cases," even if the minority cannot alone vote down a transaction,

> "minority stockholders will be in a better position to protect their interests with full disclosure and . . . an unfavorable minority vote might influence the majority to modify or reconsider the transaction in question. In [*Schlick* v. *Penn-Dixie Cement Corp.*, 507 F. 2d 374, 384 (CA2 1974),] where the stockholders had no appraisal rights under state law because the stock was listed on the New York Stock Exchange, the court advanced two additional considerations: (1) the *market* would be informed; and (2) even 'a rapacious controlling manage-

> ment' might modify the terms of a merger because it would not want to 'hang its dirty linen out on the line and thereby expose itself to suit or Securities Commission or other action—in terms of reputation and future takeovers.'" Fundamentals of Securities Regulation, at 948 (footnote omitted).

I conclude that causation is more than plausible; it is likely, even where the public shareholders cannot vote down management's proposal. Causation is established where the proxy statement is an essential link in completing the transaction, even if the minority lacks sufficient votes to defeat a proposal of management.

IV

The majority avoids the question whether a plaintiff may prove causation by demonstrating that the misrepresentation or omission deprived her of a state-law remedy. I do not think the question difficult, as the whole point of federal proxy rules is to support state-law principles of corporate governance. Nor do I think that the Court can avoid this issue if it orders judgment for petitioners. The majority asserts that respondents show no loss of a state-law remedy, because if "the material facts about the merger and Beddow's interests were not accurately disclosed, the minority votes were inadequate to ratify the merger under state law." *Ante*, at 1108. This theory requires us to conclude that the Virginia statute governing director conflicts of interest, Va. Code Ann. §13.1–691(A)(2) (1989), incorporates the same definition of materiality as the federal proxy rules. I find no support for that proposition. If the definitions are not the same, then Sandberg may have lost her state-law remedy. For all we know, disclosure to the minority shareholders that the price is $42 per share may satisfy Virginia's requirement. If that is the case, then approval by the minority without full disclosure may have deprived Sandberg of the ability to void the merger.

In all events, the theory that the merger would have been voidable absent minority shareholder approval is far more speculative than the theory that FABI and the Bank would have called off the transaction. Even so, this possibility would support a remand, as the lower courts have yet to consider the question. We are not well positioned as an institution to provide a definitive resolution to state-law questions of this kind. Here again, the difficulty of knowing what would have happened in the hypothetical universe of full disclosure suggests that we should "resolv[e] doubts in favor of those the statute is designed to protect" in order to "effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." *Mills*, 396 U. S., at 385.

I would affirm the judgment of the Court of Appeals.

REPORTER'S NOTE

The next page is purposely numbered 1201. The numbers between 1122 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 6 THROUGH OCTOBER 4, 1991

JUNE 6, 1991

Certiorari Denied

No. 90–8120 (A–907). OTEY *v.* NEBRASKA. Sup. Ct. Neb. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. Reported below: 236 Neb. 915, 464 N. W. 2d 352.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JUNE 10, 1991

Certiorari Granted—Vacated and Remanded

No. 90–134. COONEY ET UX. *v.* WHITE. Sup. Ct. Wyo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burns* v. *Reed*, 500 U. S. 478 (1991). Reported below: 792 P. 2d 1287.

No. 90–240. POLK ET UX. *v.* DIXIE INSURANCE CO. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Reported below: 897 F. 2d 1346.

No. 90–1153. SKY CHEFS, INC. *v.* DIAS. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Reported below: 919 F. 2d 1370.

No. 90–1270. ALABAMA *v.* BROWN. Ct. Crim. App. Ala. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Mu'Min* v. *Virginia*, 500 U. S. 415 (1991). Reported below: 571 So. 2d 345.

No. 90–5387. GIDNEY *v.* CAMDEN COUNTY PROSECUTOR'S OFFICE ET AL. Super. Ct. N. J., App. Div. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burns* v. *Reed*, 500 U. S. 478 (1991).

No. 90–6575. CHAVOUS, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR CHAVOUS *v.* BROWN ET AL. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Reported below: 302 S. C. 308, 396 S. E. 2d 98.

No. 90–6633. HOPE *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hernandez* v. *New York*, 500 U. S. 352 (1991). Reported below: 137 Ill. 2d 430, 560 N. E. 2d 849.

Miscellaneous Orders

No. — — ——. ALLEN *v.* ILLINOIS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. KELLY *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. IN RE DAVISON. Motion for reconsideration of application for admission to the Bar of this Court denied.

No. A–855. TAYLOR *v.* BEASLEY. Sup. Ct. Ill. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–870 (90–1771). CITY OF HENDERSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. D–955. IN RE DISBARMENT OF BRUCE. Motion to further defer denied. Disbarment entered. [For earlier order herein, see 498 U. S. 1010.]

No. D–990. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see 499 U. S. 945.]

No. D–997. IN RE DISBARMENT OF ALEXANDER. Due to mistaken identity, the order entered May 20, 1991 [500 U. S. 931], suspending James Richard Alexander, of Dallas, Tex., from the practice of law in this Court is vacated, and the rule to show cause issued on that date is discharged.

No. D–1005. IN RE DISBARMENT OF KELLY. It is ordered that Richard Kelly, of Stevensville, Mont., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1006. IN RE DISBARMENT OF SNEED. It is ordered that Thuryo A. Sneed, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1007. IN RE DISBARMENT OF RIVERS. It is ordered that Robert Rivers, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1008. IN RE DISBARMENT OF TOBIAS. It is ordered that Robert P. Tobias, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1009. IN RE DISBARMENT OF FRANKLIN. It is ordered that Gary B. Franklin, of Copiague, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1629. SALVE REGINA COLLEGE *v.* RUSSELL, 499 U. S. 225. Motion of respondent to retax costs denied.

No. 90–1286. JENKINS, AKA MCGANN *v.* BARNETT BANK OF PENSACOLA ET AL., 499 U. S. 960. Motion of petitioner to waive fee for filing petition for rehearing and to dispense with printing petition for rehearing denied.

No. 90–1604. MORALES, ATTORNEY GENERAL OF TEXAS *v.* TRANS WORLD AIRLINES, INC., ET AL.; and

No. 90–1606. ATTORNEY GENERAL OF CALIFORNIA ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 90–7282. IN RE LEWIS;

No. 90–7688. IN RE THOMAS;

No. 90–7819. IN RE GEURIN;

No. 90–7828. IN RE GEURIN; and

No. 90–7918. IN RE ROLLINS ET UX. Petitions for writs of mandamus denied.

Certiorari Granted

No. 90–918. FRANKLIN *v.* GWINNETT COUNTY PUBLIC SCHOOLS ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 911 F. 2d 617.

No. 90–7675. R. A. V. *v.* CITY OF ST. PAUL, MINNESOTA. Sup. Ct. Minn. Motion of Minnesota Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 464 N. W. 2d 507.

Certiorari Denied

No. 90–1. CITY OF LITTLE ROCK, ARKANSAS, ET AL. *v.* REYNOLDS, ADMINISTRATRIX OF ESTATE OF REEVES, DECEASED, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 2d 1004.

No. 90–590. FOLLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 195.

No. 90–616. RICE *v.* AURIEMMA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1449.

No. 90–660. FERRIN, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION *v.* DE MARTINI. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 922.

No. 90–929. MARSHALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 1312.

No. 90–1066. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 1110, 582 N. E. 2d 327.

No. 90–1201. LILLEBO ET AL. *v.* DAVIS, CONTROLLER OF CALIFORNIA, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 222 Cal. App. 3d 1421, 272 Cal. Rptr. 638.

No. 90–1365. FRANK'S NURSERY & CRAFTS, INC. *v.* DUNHAM ET VIR. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 1281.

No. 90–1450. GLK, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 967.

No. 90–1465. COLUMBUS COUNTRY CLUB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 877.

No. 90–1466. MCKINNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–1478. NACCARATO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 282.

No. 90–1514. LOCKWOOD, SECRETARY OF DEPARTMENT OF ENERGY, MINERALS, AND NATURAL RESOURCES, ET AL. *v.* KOZAK. Sup. Ct. N. M. Certiorari denied.

No. 90–1526. DUYCK *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied. Reported below: 146 Misc. 2d 629, 559 N. Y. S. 2d 79.

No. 90–1539. HERRICK *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 571 So. 2d 1303.

No. 90–1556. MISSOURI *v.* ALLEN. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 800 S. W. 2d 82.

No. 90–1582. FROTA OCEANICA BRASILEIRA, S. A. *v.* PIRES. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 161 App. Div. 2d 129, 554 N. Y. S. 2d 855.

No. 90–1584. KEMP *v.* STATE BOARD OF AGRICULTURE ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 803 P. 2d 498.

No. 90–1602. TENNESSEE GAS PIPELINE CO. *v.* ANDERMAN/SMITH OPERATING CO. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 1215.

No. 90–1605. YOUNG *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 242, 914 F. 2d 298.

No. 90–1608. FULANI ET AL. *v.* HOGSETT, SECRETARY OF STATE OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 1028.

No. 90–1609. GUERINOT, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF GUERINOT *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 862.

No. 90–1661. CONSTANT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 929 F. 2d 654.

No. 90–1703. PARNAR *v.* GREEN, NING, LILLY & JONES. Sup. Ct. Haw. Certiorari denied. Reported below: 72 Haw. 606, 804 P. 2d 1350.

No. 90–1718. ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT ET AL. *v.* NATIONAL SOLID WASTES MANAGEMENT ASSN. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 910 F. 2d 713 and 924 F. 2d 1001.

No. 90–1731. MANNINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 926 F. 2d 1355.

No. 90–5509. LARSEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 562.

No. 90–5624. BOLTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 510.

No. 90–6233. MORRIS *v.* ORMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 911 F. 2d 719.

No. 90–6394. DEAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 215.

No. 90–6967. BOCCHICCHIO *v.* FREEMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7001. FERRELL *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 184 W. Va. 123, 399 S. E. 2d 834.

No. 90–7106. STAFFORD *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–7151. WHITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 138.

No. 90–7269. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 90–7324. PENA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 920 F. 2d 1509.

No. 90–7405. BOWMAN *v.* YAZZIE ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7441. ALDAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 227.

No. 90–7461. JUVENILE MALE #2 *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 837.

No. 90–7463. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 847.

No. 90–7544. LEACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 464.

No. 90–7585. SMITH *v.* KECK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–7634. MORGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 922 F. 2d 1495.

No. 90–7641. NABKEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 921 F. 2d 276.

No. 90–7674. STAPLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–7680. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 921 F. 2d 42.

No. 90–7684. COLLINS *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7685. ZATKO *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 90–7690. BARNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 420.

No. 90–7694. PHILLIPS ET UX. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 328 N. C. 1, 399 S. E. 2d 293.

No. 90–7697. WATSON *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 561.

No. 90–7715. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7716. PAVLOS *v.* CHENEY, SECRETARY OF DEFENSE. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 833.

No. 90–7723. CARACCIOLO *v.* SMITH, JUDGE, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 573 So. 2d 845.

No. 90–7727. MARTIN, AKA CHASE *v.* DAVIES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 336.

No. 90–7735. PARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–7737. MCKINNON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 921 F. 2d 830.

No. 90–7739. CODY *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 90–7741. POWELL *v.* ROBERTS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 278.

No. 90–7743. BRIM *v.* PETERS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7744. MINTON *v.* SHEET METAL WORKERS LOCAL #54 ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–7754. DEMPSEY *v.* WHITE. C. A. 1st Cir. Certiorari denied.

No. 90–7764. GARRETT *v.* OHIO. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 90–7766. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 804.

No. 90–7768. TIMM ET AL. *v.* GUNTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 917 F. 2d 1093.

No. 90–7774. WALTERS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 311 Ore. 80, 804 P. 2d 1164.

No. 90–7782. PARKE *v.* UNITED STATES POSTAL SERVICE. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–7796. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7809. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 12.

No. 90–7818. WAGSTAFF-EL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1458.

No. 90–7826. RAMIREZ-CARVAJAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 921 F. 2d 272.

No. 90–7842. PASSOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 979.

No. 90–7844. GARGAN *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 805 P. 2d 998.

No. 90–7845. STEBBINS *v.* NATIONWIDE MUTUAL INSURANCE CO. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 383, 917 F. 2d 1313.

No. 90–7853. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 601.

No. 90–7855. ENCARNACION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1457.

No. 90–7858. D'AMARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 930 F. 2d 911.

No. 90–7863. AREVALO-NAVARRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 979.

No. 90–7906. CREEL *v.* KEENE, CHAIRMAN, BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied. Reported below: 928 F. 2d 707.

No. 90–7909. HOLZENDORF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1474.

No. 90–7914. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 925.

No. 90–7915. WOLSKY *v.* OREGONIAN PUBLISHING CO. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 1462.

No. 90–7924. BOWLING *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 585 A. 2d 1181.

No. 90–7933. ADAMITA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 846.

No. 90–7934. AISPURO-TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 863.

No. 90–7935. ENGLISH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 154.

No. 90–7936. GOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1475.

No. 90–7937. DETAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–7942. SOBAMOWO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 90–7943. SWINT *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7948. JORDAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 53.

No. 90–7952. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1476.

No. 90–7967. RAMIREZ-TALAVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 934.

No. 90–7979. MOSCONY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 927 F. 2d 742.

No. 90–7980. HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 848.

No. 90–7981. CAPOFERI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–7982. ENGLISH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 154.

No. 90–7991. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1474.

No. 90–7992. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 1089 and 925 F. 2d 1285.

No. 90–7997. LYTLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 931 F. 2d 52.

No. 90–7998. NICHOLSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 924 F. 2d 1053.

No. 90–8001. ODULOYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 924 F. 2d 116.

No. 90–8009. WILKINSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 926 F. 2d 22.

No. 90–8014. APPLETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 928 F. 2d 404.

No. 90–8018. BERNAL-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1063.

No. 90–8019. FERREIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 931 F. 2d 902.

No. 90–549. WHARTON ET AL. *v.* DUBE. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 900 F. 2d 587.

No. 90–1189. TROJAN TECHNOLOGIES, INC., ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 916 F. 2d 903.

No. 90–1283. DENHOLM *v.* HOUGHTON MIFFLIN CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 912 F. 2d 357.

No. 90–1615. REUBER *v.* FOOD CHEMICAL NEWS, INC. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 925 F. 2d 703.

No. 90–772. OHIO DEPARTMENT OF TAXATION ET AL. *v.* INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 911 F. 2d 1168.

No. 90–1510. STURMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 919 F. 2d 147.

No. 90–1379. ARIZONA *v.* KEMPTON. Ct. App. Ariz. Certiorari denied. Reported below: 166 Ariz. 392, 803 P. 2d 113.

JUSTICE WHITE, dissenting.

In this case, a reliable informant told police that respondent had cocaine in his truck. Several hours later, the police stopped respondent while he was driving his truck, asked for and received permission from respondent to search the truck, and discovered cocaine. Respondent was subsequently convicted, but the Arizona Court of Appeals reversed the conviction, holding that the search of respondent's truck was illegal because it did not fall within the automobile exception to the warrant requirement and was not conducted pursuant to a valid investigatory stop. 166 Ariz. 392, 803 P. 2d 113 (1990). The Arizona Supreme Court denied discretionary review.

The Arizona Court of Appeals' holding in this case is contrary to relevant decisions of this Court, see, *e. g.*, *United States* v. *Hensley*, 469 U. S. 221, 226–229, 232 (1985); *Alabama* v. *White*, 496 U. S. 325 (1990); *California* v. *Carney*, 471 U. S. 386, 392 (1985); *Michigan* v. *Thomas*, 458 U. S. 259, 261 (1982), and should be reversed. That the decision below was rendered by an intermediate state appellate court should make no difference. The trend in state supreme courts towards discretionary review has

resulted in the intermediate state appellate courts taking on a large and significant role in the development and application of state and federal law in their respective jurisdictions. This Court should not deny review on the basis of an outdated perception of the role of state intermediate appellate courts.

No. 90–7480. STERLING *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7745. WHITT *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 90–7770. FRANK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 90–7480, 800 S. W. 2d 513; No. 90–7745, 51 Cal. 3d 620, 798 P. 2d 849; No. 90–7770, 51 Cal. 3d 718, 798 P. 2d 1215.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–7760. SINDRAM *v.* TERRY, ATTORNEY GENERAL OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 925 F. 2d 1457.

No. 90–7761. SINDRAM *v.* AHALT ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 923 F. 2d 849.

No. 90–8209 (A–914). BIRD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 924 F. 2d 67.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 90–273. COMMISSIONER OF REVENUE OF TENNESSEE *v.* NEWSWEEK, INC.; and COMMISSIONER OF REVENUE OF TENNESSEE *v.* SOUTHERN LIVING, INC., ET AL., 499 U. S. 983;

No. 90–777. HARVEY *v.* UNITED STATES, 498 U. S. 1047;

No. 90–910. WHITCOMBE *v.* WEYERHAEUSER CORP. ET AL., 499 U. S. 959;

No. 90–1215. HEINEMEYER *v.* O'DONNELL, 499 U. S. 975;

No. 90–1383. VERDUGO *v.* CALIFORNIA, 499 U. S. 962;

No. 90–6538. JIMISON *v.* NEVADA, 500 U. S. 906;

No. 90–7093. MOORE *v.* CALIFORNIA, 499 U. S. 982;

No. 90–7385. SLACUM *v.* FRAME, 500 U. S. 909; and

No. 90–7457. WEBSTER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 500 U. S. 909. Petitions for rehearing denied.

No. 89–7430. ABU-JAMAL *v.* PENNSYLVANIA, 498 U. S. 881 and 993. Motion of petitioner for leave to file second petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this motion.

JUNE 17, 1991

Certiorari Granted—Vacated and Remanded

No. 90–1202. MOORE ET AL. *v.* KELLER INDUSTRIES, INC. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991). Reported below: 917 F. 2d 561.

Miscellaneous Orders

No. — — ——. CAMPBELL *v.* SHILLINGER, WARDEN, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–874. GOLUB *v.* UNIVERSITY OF CHICAGO ET AL. C. A. 2d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referrred to the Court, denied. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. A–889. ROGGIO *v.* UNITED STATES. Application for bond, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–981. IN RE DISBARMENT OF LOVING. Disbarment entered. [For earlier order herein, see 499 U. S. 903.]

No. D–1010. IN RE DISBARMENT OF BOLTON. It is ordered that George J. Bolton, of North Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1011. IN RE DISBARMENT OF THOMPSON. It is ordered that Beverly Kay Thompson, of Cherry Hill, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1012. IN RE DISBARMENT OF LUKAS. It is ordered that Thomas James Lukas, of Long Island City, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1013. IN RE DISBARMENT OF MILLER. It is ordered that Michael Albert Miller, of Tualatin, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 112, Orig. WYOMING *v.* OKLAHOMA. Motion of Wyoming Mining Association for leave to file a brief as *amicus curiae* granted. Exceptions to Report of the Special Master filed by Wyoming and Brief on the Merits filed by Oklahoma are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 499 U. S. 903.]

No. 90–681. HAFER *v.* MELO ET AL. C. A. 3d Cir. [Certiorari granted, 498 U. S. 1118.] Motions of American Federation of Labor and Congress of Industrial Organizations and Kenneth W. Fultz for leave to file briefs as *amici curiae* granted.

No. 90–1014. LEE ET AL. *v.* WEISMAN, PERSONALLY AND AS NEXT FRIEND OF WEISMAN. C. A. 1st Cir. [Certiorari granted, 499 U. S. 918.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–5844. FOUCHA *v.* LOUISIANA. Sup. Ct. La. [Certiorari granted, 499 U. S. 946.] Motions of American Psychiatric Association and American Orthopsychiatric Association et al. for leave to file briefs as *amici curiae* granted.

No. 90–7740. NEEDLER *v.* VALLEY NATIONAL BANK OF ARIZONA ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 8, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE MARSHALL and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–7728. IN RE MOORE. Petition for writ of mandamus denied.

No. 90–7647. IN RE SCHMIDT. Petition for writ of prohibition denied.

Certiorari Granted

No. 90–1629. UNITED STATES *v.* NORDIC VILLAGE, INC. C. A. 6th Cir. Certiorari granted. Reported below: 915 F. 2d 1049.

No. 90–1029. EASTMAN KODAK CO. *v.* IMAGE TECHNICAL SERVICES, INC., ET AL. C. A. 9th Cir. Motion of Computer and Business Equipment Manufacturers Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 903 F. 2d 612.

No. 90–1150. WILLY *v.* COASTAL CORP. ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 915 F. 2d 965.

Certiorari Denied

No. 90–834. HOME STATE BANK *v.* JOHNSON. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 563.

No. 90–984. KANSAS GAS & ELECTRIC CO. *v.* KANSAS STATE CORPORATION COMMISSION ET AL. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d xxx, 794 P. 2d 1177.

No. 90–1311. SMITH *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 913 F. 2d 469.

No. 90–1416. WOLAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 1193.

No. 90–1441. PINKNEY *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 920 F. 2d 1090.

No. 90–1445. IVY ET UX. *v.* MYERS. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 936.

No. 90–1451. WILSON *v.* UNITED STATES; and GREEN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 917 F. 2d 529 (first case); 925 F. 2d 1480 (second case).

No. 90–1483. BARTON ET AL. *v.* SMITH ET AL.; and
No. 90–1634. SMITH ET AL. *v.* BARTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1330.

No. 90–1497. ASHKENAZY PROPERTY MANAGEMENT CORP., DBA L'ERMITAGE HOTEL, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 348, 917 F. 2d 62.

No. 90–1509. VASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 235.

No. 90–1518. HEERDINK *v.* AMOCO OIL CO. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 1256.

No. 90–1521. COIRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 1008.

No. 90–1533. CARDILLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 728.

No. 90–1622. FANT *v.* STEPHENS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 90–1632. MEAIGE *v.* HARTLEY MARINE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 700.

No. 90–1635. BHAYA ET AL. *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 184.

No. 90–1636. DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN ET AL. *v.* SEAWAY PORT AUTHORITY OF DULUTH. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 503.

No. 90–1642. BOROUGH OF ROSELLE ET AL. *v.* BROWN, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF EVANS; and

No. 90–1680. BROWN, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF EVANS *v.* GRABOWSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 1097.

No. 90–1644. WHEELER *v.* WHEELER. Ct. Civ. App. Ala. Certiorari denied. Reported below: 574 So. 2d 832.

No. 90–1646. CONNELL *v.* BANK OF BOSTON ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 924 F. 2d 1169.

No. 90–1650. DENNISON *v.* COUNTY OF FREDERICK, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 921 F. 2d 50.

No. 90–1658. HBA EAST LTD. ET AL. *v.* JEA BOXING CO. ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 796 S. W. 2d 534.

No. 90–1660. SCHAEFER *v.* SUPERIOR COURT OF SAN DIEGO COUNTY (MCCANN, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–1664. PHILBROOK *v.* ANSONIA BOARD OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 925 F. 2d 47.

No. 90–1665. KIDDER, PEABODY & CO. INC. *v.* MAXUS ENERGY CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 925 F. 2d 556.

No. 90–1691. ALTON & SOUTHERN RAILWAY CO. *v.* GRIMMING. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 204 Ill. App. 3d 961, 562 N. E. 2d 1086.

No. 90–1702. GREGG POTATO SALES, INC. *v.* LANDIS BROTHERS. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 188.

No. 90–1734. MALONE *v.* GILMAN PAPER CO. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 90–1756. WYANDOTTE TRIBE OF OKLAHOMA *v.* OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 919 F. 2d 1449.

No. 90–1767. FANNIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 928 F. 2d 1133.

No. 90–6767. FIERER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 196 Ill. App. 3d 404, 553 N. E. 2d 807.

No. 90–6799. WAGNER *v.* SEELY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 2d 1575.

No. 90–6959. LAYTON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 196 Ill. App. 3d 78, 552 N. E. 2d 1280.

No. 90–7218. PAYNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 595.

No. 90–7290. DUNN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 19, 564 N. E. 2d 1054.

No. 90–7294. CIANCIOLA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 1295.

No. 90–7358. FELLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 1179.

No. 90–7476. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 20.

No. 90–7578. SANTIAGO-RIVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1473.

No. 90–7596. ALEXANDER *v.* CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 917 F. 2d 747.

No. 90–7635. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 184.

No. 90–7762. SCHMIDT *v.* JENKINS ET AL. Dist. Ct. Salt Lake County, Utah. Certiorari denied.

No. 90–7788. BALLANTYNE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 204 Ill. App. 3d 1102, 598 N. E. 2d 502.

No. 90–7791. MCNAMARA *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 862.

No. 90–7792. MARTINEZ *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–7794. LEMRICK *v.* OREGON COURT SYSTEM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 280.

No. 90–7795. MUHAMMAD, AKA ELLIOT *v.* SHABAZZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 839.

No. 90–7797. MARTIN *v.* THOMPSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7801. DOUGLAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 220 Cal. App. 3d 544, 269 Cal. Rptr. 579.

No. 90–7802. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–7803. ROSNOW *v.* RASMUSSEN ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–7804. ANDREWS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 57 Ohio St. 3d 86, 565 N. E. 2d 1271.

No. 90–7805. ZANI *v.* GLANZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7811. MCGREW *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 90–7813. JONES *v.* EASTMAN KODAK CO. C. A. 5th Cir. Certiorari denied.

No. 90–7820. DAVENPORT *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 90–7821. RODGERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 2d 219.

No. 90–7823. SMITH *v.* UNITED STATES; DAVIS *v.* UNITED STATES; SMITH *v.* UNITED STATES; JON *v.* UNITED STATES; COKE *v.* UNITED STATES; and HOWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 834 (first, third, and fourth cases) and 833 (second, fifth, and sixth cases).

No. 90–7824. SMITH *v.* MCKASKLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 601.

No. 90–7835. MCGARRY *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 1307.

No. 90–7839. BUELOW *v.* BAKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 928 F. 2d 404.

No. 90–7840. DEMOS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 90–7841. DEMOS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 90–7854. BRADLEY *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 338.

No. 90–7881. KUNS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 90–7887. WILLIAMS *v.* CITY OF ATLANTA, GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. 22, 401 S. E. 2d 530.

No. 90–7891. SCHMIDT *v.* CUTLER ET AL. Dist. Ct. Salt Lake County, Utah. Certiorari denied.

No. 90–7927. SCHMIDT *v.* UTAH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 732.

No. 90–7938. THOMPSON *v.* WIGGINTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–7944. PLETTEN *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 933.

No. 90–7945. GEDSON, AKA KERR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 859.

No. 90–7966. RAY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 304 Ark. 489, 803 S. W. 2d 894.

No. 90–7970. BRAMBLE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 925 F. 2d 532.

No. 90–8007. DAVIE *v.* MUNCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 929 F. 2d 692.

No. 90–8036. PINOCHET *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 846.

No. 90–8038. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 919 F. 2d 495.

No. 90–8040. LINCOLN, AKA OMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 925 F. 2d 255.

No. 90–8042. CROSBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 928 F. 2d 397.

No. 90–8049. SNOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 599.

No. 90–8057. STURDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 601.

No. 90–8064. BOHANAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 90–8065. DANIELS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1457.

No. 90–872. YELLOW BUS LINES, INC. *v.* DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION 639 ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 286 U. S. App. D. C. 182, 913 F. 2d 948.

No. 90–1643. KEHR PACKAGES, INC., ET AL. *v.* FIDELCOR, INC., ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 926 F. 2d 1406.

No. 90–1463. WARNER CABLE COMMUNICATIONS, INC. *v.* CITY OF NICEVILLE. C. A. 11th Cir. Motions of Florida Cable

Television Association et al., National Cable Television Association, Inc., Community Antenna Television Association, and Cablevision Systems Corp. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 911 F. 2d 634.

No. 90–1544. HATCHETT *v.* UNITED STATES. C. A. 6th Cir. Motion of Federal Criminal Defense Association of Michigan et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 918 F. 2d 631.

No. 90–1627. COMMISSIONER OF REVENUE SERVICES OF CONNECTICUT *v.* SFA FOLIO COLLECTIONS, INC. Sup. Ct. Conn. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 217 Conn. 220, 585 A. 2d 666.

No. 90–7483. D'AMARIO *v.* BUTLER HOSPITAL ET AL. C. A. 1st Cir. Motion of petitioner to strike Brief in Opposition and for sanctions denied. Certiorari denied. Reported below: 921 F. 2d 8.

No. 90–7506. RILEY *v.* DELAWARE. Sup. Ct. Del.; and
No. 90–7767. MCDOUGALL *v.* DIXON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: No. 90–7506, 585 A. 2d 719; No. 90–7767, 921 F. 2d 518.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–8052. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 922 F. 2d 782.

No. 90–8331 (A–945). BIRD *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 90–8332 (A–946). BIRD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 934 F. 2d 629.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 88–6833. MOON *v.* GEORGIA, 499 U. S. 982;

No. 89–7024. MCCLESKEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 499 U. S. 467;

No. 90–1226. HOPE *v.* UNITED STATES, 499 U. S. 983;

No. 90–1265. OSHATZ *v.* UNITED STATES, 500 U. S. 910;

No. 90–1332. COHEN *v.* BERGER, 499 U. S. 962;

No. 90–1442. BUSH ET UX. *v.* WATER POLLUTION CONTROL AUTHORITY FOR THE TOWN OF WATERFORD, 500 U. S. 906;

No. 90–1519. CAMOSCIO *v.* HODDER ET AL., 500 U. S. 906;

No. 90–5946. HINCHEY *v.* ARIZONA, 499 U. S. 963;

No. 90–6756. SCEIFERS *v.* DUCKWORTH, WARDEN, 499 U. S. 978;

No. 90–6933. MATHIS *v.* WAYNE COUNTY FRIEND OF THE COURT ET AL., 499 U. S. 928;

No. 90–7044. DELBRIDGE ET AL. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, 499 U. S. 940;

No. 90–7107. READ ET UX. *v.* DUCK ET AL., 499 U. S. 964;

No. 90–7120. POPE *v.* DEPARTMENT OF THE ARMY, 499 U. S. 978;

No. 90–7192. WHIGHAM *v.* FOLTZ, WARDEN, 499 U. S. 942;

No. 90–7194. SMITH *v.* CALGON CARBON CORP. ET AL., 499 U. S. 966;

No. 90–7337. LE BLANC *v.* UNIVERSITY OF MICHIGAN, AKA BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, 500 U. S. 908;

No. 90–7509. MALONE *v.* MISSOURI, 500 U. S. 929; and

No. 90–7615. SMITH *v.* NEW YORK STATE WORKERS' COMPENSATION BOARD, 500 U. S. 926. Petitions for rehearing denied.

No. 90–992. NEVADA ET AL. *v.* WATKINS, SECRETARY OF ENERGY, ET AL., 499 U. S. 906. Motion for leave to file petition for rehearing denied.

JUNE 18, 1991

Dismissal Under Rule 46

No. 90–1780. H & M CONSTRUCTION CO., INC., ET AL. *v.* TELL CITY CHAIR CO., INC. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 914 F. 2d 258.

JUNE 19, 1991

Dismissal Under Rule 46

No. 90–949. WARD *v.* ATTRIDGE, MAGISTRATE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 287 U. S. App. D. C. 246, 921 F. 2d 286.

JUNE 20, 1991

Miscellaneous Order

No. A–953. FEINSTEIN ET AL. *v.* UNITED STATES ET AL. Application for partial stay of an order of the United States District Court for the Southern District of New York, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

JUNE 24, 1991

Certiorari Granted—Vacated and Remanded

No. 90–1167. BOARD OF PUBLIC EDUCATION AND ORPHANAGE FOR BIBB COUNTY ET AL. *v.* LUCAS ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for clarification of the jurisdictional issue presented by the Solicitor General in his brief for the United States as *amicus curiae* filed June 4, 1991. Reported below: 908 F. 2d 851.

No. 90–1433. FLORIDA *v.* TRODY. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McNeil* v. *Wisconsin*, *ante*, p. 171. Reported below: 559 So. 2d 641.

No. 90–5849. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burns* v. *United States*, *ante*, p. 129. Reported below: 901 F. 2d 1394.

No. 90–5999. HILL *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burns* v. *United States*, *ante*, p. 129. Reported below: 911 F. 2d 129.

Miscellaneous Orders

No. — — ——. IN RE KARAPINKA. Motion to direct the Clerk to file petition for writ of mandamus that does not comply with the Rules of this Court denied.

No. — — ——. PARKER *v.* MAZE ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–916. MOORE *v.* JARVIS, SHERIFF OF DEKALB COUNTY, GEORGIA. C. A. 11th Cir. Application for recall and stay of mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–927. ABRAMO *v.* WORCESTER DIVISION OF THE SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHU-

SETTS. Application for stay of trial proceedings, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–936. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* ROSENFELD. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Northern District of California, case Nos. C–85–1709 and C–85–2247, filed March 29, 1991, be and the same is hereby stayed pending final disposition of the appeal of that order by the United States Court of Appeals for the Ninth Circuit following the District Court's action on the Government's motion for reconsideration filed April 16, 1991.

No. A–971. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* FRANCIS. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, granted provided that the stay shall remain in effect until 7 a.m. Tuesday, June 25, 1991, in order to allow for further consideration by the Court of Appeals in light of *Coleman* v. *Thompson*, *ante*, p. 722. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would deny the application to vacate the stay of execution.

No. D–963. IN RE DISBARMENT OF HENDERSON. Disbarment entered. [For earlier order herein, see 498 U. S. 1044.]

No. D–965. IN RE DISBARMENT OF LACKEY. Disbarment entered. [For earlier order herein, see 498 U. S. 1064.]

No. D–977. IN RE DISBARMENT OF ZAHARIA. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–983. IN RE DISBARMENT OF STITT. Disbarment entered. [For earlier order herein, see 499 U. S. 916.]

No. D–993. IN RE DISBARMENT OF BERGER. Disbarment entered. [For earlier order herein, see 499 U. S. 957.]

No. D–996. IN RE DISBARMENT OF BERGMANN. Disbarment entered. [For earlier order herein, see 499 U. S. 973.]

No. D–1014. IN RE DISBARMENT OF BENNETT. It is ordered that R. Jerry Bennett, of Colorado Springs, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1015. IN RE DISBARMENT OF BURKE. It is ordered that Robert B. Burke, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1016. IN RE DISBARMENT OF GAMER. It is ordered that Harold M. Gamer, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1017. IN RE DISBARMENT OF CARONNA. It is ordered that Anthony S. Caronna, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1018. IN RE DISBARMENT OF HAYDEN. It is ordered that John J. Hayden, of Goshen, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1019. IN RE DISBARMENT OF TURNER. It is ordered that James Henry Turner, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of Georgia and Maine for leave to file a complaint in intervention referred to the Special Master. [For earlier order herein, see, *e. g.*, 498 U. S. 979.]

No. 90–1205. UNITED STATES *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 90–6588. AYERS ET AL. *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 958.] Motion of National Bar Association et al. for leave to file a brief as *amici curiae* granted.

No. 90–1262. ARKANSAS ET AL. *v.* OKLAHOMA ET AL.; and

No. 90–1266. ENVIRONMENTAL PROTECTION AGENCY *v.* OKLAHOMA ET AL. C. A. 10th Cir. [Certiorari granted, 499 U. S. 946.] Motion of the Solicitor General for divided argument granted.

No. 90–1372. MAIN HURDMAN *v.* FINE ET AL. C. A. 5th Cir. Motion of the parties to further defer consideration of petition for writ of certiorari granted.

No. 90–1676. GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL SOLID WASTES MANAGEMENT ASSN. C. A. 7th Cir.; and

No. 90–1712. NORTH CAROLINA *v.* SMITH. Sup. Ct. N. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–1904. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 90–6105. EVANS *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 500 U. S. 951.] Motion for appointment of counsel granted, and it is ordered that C. Michael Abbott, Esq., of Atlanta, Ga., be appointed to serve as counsel for petitioner in this case.

No. 90–1647. IN RE LOUISIANA EX REL. GUSTE, ATTORNEY GENERAL;

No. 90–7645. IN RE REIDT; and

No. 90–7899. IN RE GAY. Petitions for writs of mandamus denied.

No. 90–7901. IN RE ELLEDGE. Motions of National Legal Aid and Defender Association and National Association of Criminal

Defense Lawyers for leave to file briefs as *amici curiae* granted. Petition for writ of mandamus denied.

Certiorari Granted

No. 90–1577. UNITED STATES *v.* R. L. C. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 915 F. 2d 320.

Certiorari Denied

No. 90–1194. MAINE PUBLIC UTILITIES COMMISSION *v.* MAINE YANKEE ATOMIC POWER CO. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 581 A. 2d 799.

No. 90–1423. MASSILLON BOARD OF EDUCATION *v.* FARBER. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1391.

No. 90–1460. TARASSOUM *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied.

No. 90–1506. GLOBUS *v.* SKINNER, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–1508. CITY OF EL CENTRO, CALIFORNIA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 922 F. 2d 816.

No. 90–1541. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 379, 917 F. 2d 1309.

No. 90–1542. RIVIECCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 919 F. 2d 812.

No. 90–1550. HUDSON ET AL. *v.* CHICAGO TEACHERS UNION, LOCAL 1, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 922 F. 2d 1306.

No. 90–1563. MCEVOY *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st and 12th Jud. Dists. Certiorari denied.

No. 90–1593. PARAMOUNT PICTURES CORP. ET AL. *v.* THE MOVIE 1 & 2. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1245.

No. 90–1601. HALL ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 334.

No. 90–1610. HWANG JUNG JOO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 862.

No. 90–1621. KNIGHT ET AL. *v.* BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 90–1640. CHURCH *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 70.

No. 90–1652. DALE *v.* AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, INTERNATIONAL, AFL–CIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 57 Ohio St. 3d 112, 567 N. E. 2d 253.

No. 90–1653. NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP *v.* CITY OF ST. PAUL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 924 F. 2d 741.

No. 90–1655. GORDON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 203 Ill. App. 3d 1103, 597 N. E. 2d 303.

No. 90–1659. BAUSCH & LOMB INC. *v.* HEWLETT-PACKARD CO. C. A. Fed. Cir. Certiorari denied. Reported below: 925 F. 2d 1480.

No. 90–1662. BAIRSTOW ET AL. *v.* BAIRSTOW ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 201 Ill. App. 3d 1102, 589 N. E. 2d 1154.

No. 90–1663. SACHS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 881, 571 N. E. 2d 94.

No. 90–1669. DIXON *v.* HUBERT ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. XXIX, 400 S. E. 2d 17.

No. 90–1673. COLUMBIA OLDSMOBILE, INC. *v.* CITY OF MONTGOMERY, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 56 Ohio St. 3d 60, 564 N. E. 2d 455.

No. 90–1675. REICHELT ET AL. *v.* EMHART CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 921 F. 2d 425.

No. 90–1679. KILE *v.* NORTH PACIFIC CONSTRUCTION CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 145.

No. 90–1681. HODORY *v.* HAMILTON. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 574 So. 2d 147.

No. 90–1682. CATHEY ET UX. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 805 S. W. 2d 387.

No. 90–1687. MIRAMAR HOTEL CORP. *v.* SANTA MONICA CULINARY WELFARE FUND ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 1491.

No. 90–1690. BOND ET UX. *v.* OCTAGON PROCESS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 926 F. 2d 1573.

No. 90–1693. BROWN *v.* WONG ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 72 Haw. 603, 807 P. 2d 39.

No. 90–1696. LESTER *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–1710. TEXAS *v.* GRIBBLE. Ct. Crim. App. Tex. Certiorari denied. Reported below: 808 S. W. 2d 65.

No. 90–1711. GRIDLEY *v.* CLEVELAND PNEUMATIC CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 924 F. 2d 1310.

No. 90–1716. IOWA DISTRICT COURT FOR WINNESHIEK COUNTY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 464 N. W. 2d 233.

No. 90–1732. NICOLS *v.* NICOLS. Ct. App. Mich. Certiorari denied.

No. 90–1741. BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG ET AL. *v.* GORG, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF KAUSSEN, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. XXIX, 400 S. E. 2d 17.

No. 90–1742. HOOPER *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 585 So. 2d 137.

No. 90–1746. TROEN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 100 Ore. App. 442, 786 P. 2d 751.

No. 90–1770. AMERNATIONAL INDUSTRIES, INC. *v.* ELECTRO-EXPORTIMPORT. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 970.

No. 90–1799. PRUESSMAN *v.* MCDONALD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 848.

No. 90–1812. DARBOVEN *v.* NICKOLOPOULOS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 931 F. 2d 49.

No. 90–5586. JANSSEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 192 Ill. App. 3d 1105, 577 N. E. 2d 201.

No. 90–5706. HALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 959.

No. 90–6710. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 198 Ill. App. 3d 831, 556 N. E. 2d 619.

No. 90–7185. PALMER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7227. SEGARRA-PALMER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 934.

No. 90–7246. MALDONADO-RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 934.

No. 90–7283. DEASES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 2d 118.

No. 90–7297. TURNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 803 P. 2d 1152.

No. 90–7338. LAFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7351. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 90–7370. WILL *v.* WILL. Sup. Ct. Va. Certiorari denied.

No. 90–7371. WALLACE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7394. DOUGALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 932.

No. 90–7470. DUENAS-ZARAGOZA, AKA MENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7491. SCOTT *v.* DELO ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–7539. HORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 921 F. 2d 540.

No. 90–7562. MANNING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 83.

No. 90–7563. HICKEY *v.* UNITED STATES; and
No. 90–7591. KAVANAGH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 254.

No. 90–7566. NOVEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 922 F. 2d 624.

No. 90–7626. BIBO-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 2d 1398.

No. 90–7629. HARDISON *v.* BRAXTON, COLONEL, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 930 F. 2d 33.

No. 90–7665. CHAVIRA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 1193.

No. 90–7678. PRICE *v.* WILLIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 2d 1065.

No. 90–7687. PAITSEL *v.* MISSISSIPPI ET AL. Sup. Ct. Miss. Certiorari denied.

No. 90–7717. SANDERS *v.* DISTRICT OF COLUMBIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 596.

No. 90–7726. HENDRICKS *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 928 F. 2d 410.

No. 90–7807. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1000.

No. 90–7849. THOMAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 333.

No. 90–7859. CLEMONS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 921 F. 2d 187.

No. 90–7862. DONATI *v.* MORRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 595.

No. 90–7867. HENSON-EL *v.* ROGERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 51.

No. 90–7868. MINK *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 141 Ill. 2d 163, 565 N. E. 2d 975.

No. 90–7872. MATTHEWS, AKA BROWN *v.* JOLLY ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–7874. HOLBROOK *v.* HURT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–7875. RAMOS, A MINOR, REPRESENTED BY HER MOTHER, KEECH, ET AL. *v.* CITY OF YORK, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 730.

No. 90–7876. BROYLES *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 90–7877. SEGOVIA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 90–7878. BILLINGS *v.* SECRETARY OF LABOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 854.

No. 90–7879. ROBINSON *v.* STIFTEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 928 F. 2d 396.

No. 90–7883. LEONARD *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7886. SHOWS *v.* NCNB NATIONAL BANK OF NORTH CAROLINA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 847.

No. 90–7889. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–7890. CROSS *v.* GRIFFIN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7892. WILSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 90–7893. PERRY *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 257.

No. 90–7895. BAY *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 567 So. 2d 798.

No. 90–7897. MARTENY *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 848.

No. 90–7907. COSNER *v.* BEATTY, JUDGE, CIRCUIT COURT OF HENRY COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 90–7917. WESSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 247 Kan. 639, 802 P. 2d 574.

No. 90–7919. VERNON *v.* HATFIELD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1060.

No. 90–7921. MILLER *v.* TOOMBS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1464.

No. 90–7925. RODEN *v.* HOWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 1459.

No. 90–7926. BOYD *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 90–7946. MCCABE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7947. MERCADO *v.* BLOCK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1470.

No. 90–7953. CRANE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 116 Wash. 2d 315, 804 P. 2d 10.

No. 90–7971. LOCKHART *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7986. RUIZ-VALDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 923 F. 2d 856.

No. 90–7989. JOHNSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7993. CAUDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1462.

No. 90–7995. JOHNSON *v.* ATTORNEY GENERAL OF ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–8005. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 90–8025. MURPHY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 90–8053. BOUDREAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 112.

No. 90–8058. CARNEY *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 930 F. 2d 38.

No. 90–8068. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 928 F. 2d 407.

No. 90–8071. BEVERLY ET AL. *v.* UNITED STATES; and
No. 90–8087. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 921 F. 2d 559.

No. 90–8074. REUVELTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 930 F. 2d 924.

No. 90–8077. REYES-VASQUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1497.

No. 90–8089. SMALLWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 1231.

No. 90–8090. ROLLINS ET UX. *v.* KRAMER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 610.

No. 90–8096. WASHINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 927 F. 2d 613.

No. 90–8106. LOMAX *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 188.

No. 90–8112. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 600.

No. 90–8115. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 274.

No. 90–8116. FULLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1458.

No. 90–8119. SCHIFF *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 919 F. 2d 830.

No. 90–8170. ORTIZ *v.* LEFEVRE, SUPERINTENDENT, FRANKLIN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 932 F. 2d 956.

No. 90–1520. AQUA-CHEM, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 910 F. 2d 1487.

No. 90–1587. CAPELETTI BROS., INC., ET AL. *v.* BROWARD COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 931 F. 2d 903.

No. 90–1616. OHIO *v.* WILLIAMS. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 57 Ohio St. 3d 24, 565 N. E. 2d 563.

No. 90–1678. COLORADO *v.* GALIMANIS. Ct. App. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 765 P. 2d 644.

No. 90–1684. BREWER, NATURAL GUARDIAN AND DULY-APPOINTED NEXT FRIEND OF BREWER *v.* LINCOLN NATIONAL

LIFE INSURANCE CO. C. A. 8th Cir. Motion of National Depressive and Manic Depressive Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 921 F. 2d 150.

No. 90–5950. SPENCE *v.* TEXAS. Ct. Crim. App. Tex.; and No. 90–8175. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 90–5950, 790 S. W. 2d 339; No. 90–8175, 804 S. W. 2d 95.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–7755. RECTOR *v.* BRYANT, ATTORNEY GENERAL OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 570.

JUSTICE MARSHALL, dissenting.

In *Ford* v. *Wainwright*, 477 U. S. 399 (1986), this Court recognized that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.*, at 409–410. The full Court, however, did not attempt a comprehensive definition of insanity or incompetence in this setting. See *id.*, at 407–408, 409–410; *id.*, at 418 (Powell, J., concurring in part and concurring in the judgment). This petition presents the question whether a prisoner whose mental incapacity renders him unable to recognize or communicate facts that would make his sentence unlawful or unjust is nonetheless competent to be executed. Because *Ford* leaves this question unanswered, and because this is an important and recurring issue in the administration of the death penalty, I would grant the petition.

I

After shooting and killing a police officer sent to investigate petitioner's involvement in another homicide, petitioner attempted to end his own life by shooting himself in the head. The gunshot did not kill petitioner. However, it did sever a three-inch section

of petitioner's brain, resulting in a frontal lobotomy. See 923 F. 2d 570, 571, and n. 2 (CA8 1991). The trial court rejected petitioner's claim that he was incompetent to stand trial for murder of the police officer. Petitioner's conviction and sentence of death were affirmed on appeal.

Petitioner thereafter filed a petition for a writ of habeas corpus in federal district court, arguing that his deteriorated mental condition rendered him incompetent to be executed. The District Court ordered a mental evaluation of petitioner to be conducted by the United States Medical Center for Federal Prisoners. The examiners reached two conclusions. First, the examiners determined "that no mental illness or defect prevents [petitioner] from being aware of his impending execution and the reason for it." *Id.*, at 572. Second, applying the competency standard adopted by the American Bar Association in its Criminal Justice Mental Health Standards,[1] the examiners reported that

> "[petitioner] would have considerable difficulty due to his organic deficits in being able to work in a collaborative, cooperative effort with an attorney. In our opinions it appears that *he would not be able to recognize or understand facts which might be related to his case which might make his punishment unjust or unlawful.*" *Ibid.* (emphasis added).

The District Court concluded that, for purposes of *Ford* v. *Wainwright*, *supra*, petitioner's competency to be executed turned solely on his appreciation of the nature of his punishment. Consequently, the court denied the writ. See 727 F. Supp. 1285, 1292 (ED Ark. 1990).

Petitioner appealed this determination to the Court of Appeals for the Eighth Circuit. Like the District Court, the Court of Appeals concluded that petitioner's inability to recognize or communi-

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[1] ABA Standard 7–5.6(b) provides:

"A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, *the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.*" ABA Criminal Justice Mental Health Standards 7–5.6(b) (1989) (emphasis added).

cate facts that might make his punishment unlawful or unjust was of no legal consequence. See 923 F. 2d, at 572–573. Purporting to draw on the majority opinion in *Ford* and on Justice Powell's concurring opinion, the Court of Appeals concluded that the only considerations relevant to petitioner's competency were "(1) whether petitioner understands *that* he is to be punished by execution; and (2) whether petitioner understands *why* he is being punished." *Id.*, at 572 (emphasis added). Because the medical examiners had determined that petitioner was competent to be executed by these criteria, the Court of Appeals affirmed the District Court's denial of habeas relief.

The lower courts clearly erred in viewing *Ford* as settling the issue whether a prisoner can be deemed competent to be executed notwithstanding his inability to recognize or communicate facts showing his sentence to be unlawful or unjust. Although the Court in *Ford* did emphasize the injustice "of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life," 477 U. S., at 409, the Court stressed that this was just one of many conditions that were treated as rendering a prisoner incompetent (or insane) at common law, see *id.*, at 407–408, 409–410. Indeed, the Court quoted with approval Blackstone's discussion of this topic, which clearly treats as a bar to execution a prisoner's inability to recognize grounds for avoiding the sentence:

> "'[I]f, after judgment, [a capital prisoner] becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, *had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.*'" *Id.*, at 407 (emphasis added), quoting 4 W. Blackstone, Commentaries *24–*25 (1769).

It is true, as the Court of Appeals noted, that Justice Powell addressed and rejected this definition of incompetence in his concurring opinion. See 477 U. S., at 419–421. But even he recognized that the full Court left the issue open. See *id.*, at 418 (noting that Court does not resolve "the meaning of insanity in this context").

In my view, a strong argument can be made that Justice Powell's answer to this open question is the wrong one. As we have emphasized, the Eighth Amendment prohibits any punishment considered cruel and unusual at common law as well as any pun-

ishment contrary to "the 'evolving standards of decency that mark the progress of a maturing society.'" *Penry* v. *Lynaugh*, 492 U. S. 302, 330–331 (1989), quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); accord, *Stanford* v. *Kentucky*, 492 U. S. 361, 368–369 (1989); *Ford* v. *Wainwright*, *supra*, at 405–406. The common law's hostility to putting a man to death under such circumstances is documented not only by Blackstone, see 4 W. Blackstone, *supra*, *24–*25, *388–*389, but also by other commentators on English common law, see 1 M. Hale, Pleas of the Crown 35 (1736), and by numerous early American decisions, see *State* v. *Helm*, 69 Ark. 167, 171–173, 61 S. W. 915, 916–917 (1901); *People* v. *Geary*, 298 Ill. 236, 245, 131 N. E. 652, 655–656 (1921); *Barker* v. *State*, 75 Neb. 289, 292–293, 106 N. W. 450, 451 (1905); *In re Smith*, 25 N. M. 48, 59–60, 176 Pac. 819, 823 (1918); *Freeman* v. *People*, 4 Denio (N. Y.) 9, 20, 47 Am. Dec. 216, 219–220 (1847). See generally *Solesbee* v. *Balkcom*, 339 U. S. 9, 20, n. 3 (1950) (Frankfurter, J., dissenting); 1 J. Chitty, The Criminal Law *761 (5th ed. 1847); 1 W. Russell, Crimes and Misdemeanors 14 (8th ed. 1857); L. Shelford, The Law Concerning Lunatics, Idiots and Persons of Unsound Mind 295 (1833); Annot., 3 A. L. R. 94, 97–99 (1919).[2] Objective indicia of contemporary mores likewise

[2]Justice Powell did not dispute the established status of this definition of incompetence at common law. See *Ford* v. *Wainwright*, 477 U. S. 399, 419 (1986) (concurring in part and concurring in the judgment). Instead, he reasoned that the advent of increased opportunities for direct and collateral review of criminal convictions had so reduced the possibility of undiscovered error as to render this conception obsolete. See *id.*, at 420–421. This view strikes me not only as inconsistent with the established principle "that the Eighth Amendment's ban on cruel and unusual punishment embraces, *at a minimum*, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *id.*, at 405 (emphasis added); accord, *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989), but also as somewhat question begging. For if a prisoner is incapable of recognizing or communicating facts that would facilitate collateral review, there is no reason to assume that collateral review in his case has rooted out all trial errors. In addition, Justice Powell's argument seems to miss at least half the point of the common law conception of incompetence. This definition focuses not only on the prisoner's capacity to recognize and communicate facts showing that his sentence is *unlawful*, but also on his capacity to recognize and communicate facts showing that his sentence is *unjust*. Absent this capacity, the prisoner is unable to participate in efforts to seek executive clemency, see, *e. g.*, Mo. Ann. Stat. § 552.060.1 (Supp. 1991), the appropriateness of which will not necessarily be disclosed in the course of direct or collateral review of the prison-

condemn execution of a prisoner afflicted with a "mental disease or defect [depriving him of the] capacity to understand . . . matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." Mo. Ann. Stat. § 552.060.1 (Supp. 1991); accord, Miss. Code Ann. § 99–19–57(2)(b) (Supp. 1990); N. C. Gen. Stat. § 15A–1001 (1990); ABA Criminal Justice Mental Health Standards 7–5.6(b) (1989).

The issue in this case is not only unsettled, but is also recurring and important. The stark realities are that many death row inmates were afflicted with serious mental impairments before they committed their crimes and that many more develop such impairments during the excruciating interval between sentencing and execution. See Lewis, Pincus, Feldman, Jackson & Bard, Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 840–841 (1986); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law & Psychology Rev. 141, 176–181 (1979); Gallemore & Panton, Inmate Responses to Lengthy Death Row Confinement, 129 Am. J. Psychiatry 167, 168, 169 (1972). Unavoidably, then, the question whether such persons can be put to death once the deterioration of their faculties has rendered them unable even to appeal to the law or the compassion of the society that has condemned them is central to the administration of the death penalty in this Nation. I would therefore grant the petition for certiorari in order to resolve *now* the questions left unanswered by our decision in *Ford* v. *Wainwright*.

II

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition and vacate the death sentence even if I did not view the issue in this case as being independently worthy of this Court's plenary review.

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er's conviction. Ultimately, then, the common law conception of incompetence embodies the principle that it is inhumane to put a man to death when he has been rendered incapable of appealing to the mercy of the society that has condemned him.

No. 90–7861. BEN-MOSHE *v.* MARTINEZ, FORMER GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 90–1340. SIMPSON *v.* SIMPSON ET AL., 500 U. S. 932;
No. 90–1391. HEJL *v.* CITY OF AUSTIN ET AL., 500 U. S. 905;
No. 90–1512. PENN ET UX. *v.* PARKE STATE BANK, 500 U. S. 918;
No. 90–7091. GUERRERO *v.* UNITED STATES, 500 U. S. 920;
No. 90–7104. TETER *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER, 500 U. S. 955;
No. 90–7156. VENKATESAN *v.* WHITE ET AL., 499 U. S. 965;
No. 90–7279. DAVIS *v.* BEARD, WARDEN, ET AL., 500 U. S. 907;
No. 90–7306. BURNS *v.* BURNS ET AL., 500 U. S. 907;
No. 90–7320. WATKINS *v.* WEISS, 500 U. S. 907;
No. 90–7407. FLEMING *v.* COLORADO, 500 U. S. 921;
No. 90–7424. KISKILA ET UX. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE (BUSINESS EXCHANGE, INC., ET AL., REAL PARTIES IN INTEREST), 500 U. S. 922;
No. 90–7555. RUTHERFORD *v.* UNITED STATES, 500 U. S. 925; and
No. 90–7597. GERMANO ET UX. *v.* BLEVINS, JUDGE, DISTRICT COURT FOR THE SEVENTH JUDICIAL DISTRICT OF OKLAHOMA, 500 U. S. 925. Petitions for rehearing denied.

No. 89–1217. LEHNERT ET AL. *v.* FERRIS FACULTY ASSN. ET AL., 500 U. S. 507. Petition for limited rehearing and other relief denied.

JUNE 25, 1991

Certiorari Denied

No. 90–8449 (A–976). FRANCIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 90–8450 (A–977). FRANCIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 581 So. 2d 583.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JUNE 28, 1991

Dismissal Under Rule 46

No. 90–1603. R. H. MACY & CO., INC., ET AL. *v.* CONTRA COSTA COUNTY, CALIFORNIA. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 500 U. S. 951.] Writ of certiorari dismissed under this Court's Rule 46.

Vacated and Remanded on Appeal

No. 90–1187. HUNTER *v.* MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, ET AL. Appeal from D. C. W. D. La. Judgment vacated and case remanded for further consideration in light of *Houston Lawyers' Assn.* v. *Attorney General of Tex.*, *ante*, p. 419, and *Clark* v. *Roemer*, 500 U. S. 646 (1991). Reported below: 757 F. Supp. 25.

Certiorari Granted—Vacated and Remanded

No. 89–1696. PEABODY COAL CO. ET AL. *v.* MARTIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF TAYLOR, DECEASED, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pauley* v. *BethEnergy Mines, Inc.*, *ante*, p. 680. JUSTICE KENNEDY took no part in the consideration or decision of this case. Reported below: 892 F. 2d 503.

No. 90–172. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* ROBINETTE. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pauley* v. *BethEnergy Mines, Inc.*, *ante*, p. 680. Reported below: 902 F. 2d 1566.

No. 90–382. VILLAGE OF MILFORD, MICHIGAN *v.* PROFESSIONAL LAWN CARE ASSN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wisconsin Public Intervenor* v. *Mortier*, *ante*, p. 597. Reported below: 909 F. 2d 929.

No. 90–473. ARIZONA *v.* BARTLETT. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harmelin* v. *Michigan*, *ante*, p. 957. Reported below: 164 Ariz. 229, 792 P. 2d 692.

No. 90–645. NORWEST BANK DULUTH, N. A. *v.* JAMES, MINNESOTA COMMISSIONER OF REVENUE, ET AL. Sup. Ct. Minn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *James B. Beam Distilling Co.* v. *Georgia*, *ante*, p. 529. Reported below: 457 N. W. 2d 716.

No. 90–673. BASS ET AL. *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *James B. Beam Distilling Co.* v. *Georgia*, *ante*, p. 529. Reported below: 302 S. C. 250, 395 S. E. 2d 171.

No. 90–898. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari before judgment granted, judgment of the United States District Court for the Middle District of Louisiana vacated, and case remanded to that court for further consideration in light of *Chisom* v. *Roemer*, *ante*, p. 380.

No. 90–1137. PARKE, WARDEN *v.* GILLENWATER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ylst* v. *Nunnemaker*, *ante*, p. 797. Reported below: 909 F. 2d 1483.

No. 90–1432. CLARKE, WARDEN *v.* ROSS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

No. 90–1569. FLEMING LANDFILL, INC., ET AL. *v.* GARNES ET UX. Sup. Ct. App. W. Va. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991).

No. 90–1597. NATIONAL PRIVATE TRUCK COUNCIL, INC., ET AL. *v.* OKLAHOMA TAX COMMISSION ET AL. Sup. Ct. Okla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dennis* v. *Higgins*, 498 U. S. 439 (1991). Reported below: 806 P. 2d 598.

No. 90–1625. NORTHWEST SAVINGS BANK, PASA, ET AL. *v.* WELCH ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *James B. Beam Distilling Co.* v. *Georgia*, *ante*, p. 529, and *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, *ante*, p. 350. Reported below: 923 F. 2d 989.

No. 90–1685. HARPER ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION; and

No. 90–1772. LEWY ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *James B. Beam Distilling Co.* v. *Georgia*, *ante*, p. 529. Reported below: 241 Va. 232, 401 S. E. 2d 868.

No. 90–7713. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Braxton* v. *United States*, 500 U. S. 344 (1991). Reported below: 929 F. 2d 697.

Miscellaneous Orders

No. — — —. COOK ET AL. *v.* CENTEL CABLE TELEVISION COMPANY OF OHIO, INC., ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–968. PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., ET AL. *v.* CITY OF NEW YORK ET AL. Application

for injunction, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–971. IN RE DISBARMENT OF CRANE. Disbarment entered. [For earlier order herein, see 498 U. S. 1118.]

No. D–1020. IN RE DISBARMENT OF DELLA-DONNA. It is ordered that Alphonse Della-Donna, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1021. IN RE DISBARMENT OF DUVA. It is ordered that Anthony William Duva, of Gainesville, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 118, Orig. UNITED STATES *v.* ALASKA. It has been suggested that the United States and Alaska are in agreement on the facts relevant to a decision in this action. If this is the case, the parties are invited to file a stipulation of facts in this Court on or before 60 days from the date of this order. If such a stipulation is not timely filed, a Special Master will be appointed and the case will proceed in the usual manner. If such a stipulation is filed, the parties shall then brief the legal issues. The brief of the United States shall be filed no later than 45 days after the filing of the stipulation of facts. Alaska's brief shall be filed within 30 days thereafter, after which the United States may promptly file a reply brief. The case will then be orally argued. [For earlier order herein, see 499 U. S. 946.]

No. 87–1095. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* BROYLES ET AL., 488 U. S. 105. Motion of respondents Charlie Broyles and Lisa Kay Colley for award of attorney's fees and expenses denied without prejudice to refiling in the United States Court of Appeals for the Fourth Circuit.

No. 89–7401. CLARKE *v.* WEST VIRGINIA BOARD OF REGENTS ET AL., 497 U. S. 1023. Motion of petitioner to reinstate case on docket denied.

No. 90–1124. JACOBSON *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 499 U. S. 974.] Motion of Americans for Ef-

fective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 90–1126. NORMAN ET AL. *v.* REED ET AL.; and

No. 90–1435. COOK COUNTY OFFICERS ELECTORAL BOARD ET AL. *v.* REED ET AL. Sup. Ct. Ill. [Certiorari granted, 500 U. S. 931.] Motion of petitioners Cook County Officers Electoral Board et al. to expedite oral argument granted.

No. 90–6113. WHITE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. [Certiorari granted, 500 U. S. 904.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–8229. IN RE ROBINSON. Petition for writ of habeas corpus denied.

No. 90–7975. IN RE LEE. Petition for writ of mandamus denied.

Certiorari Granted

No. 90–1596. ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, ET AL. *v.* SEATTLE AUDUBON SOCIETY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 914 F. 2d 1311.

No. 90–7477. SMITH *v.* BARRY ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 919 F. 2d 893.

Certiorari Denied

No. 89–6960. YOUNG *v.* MILLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 1276.

No. 89–7296. LOPEZ-PENA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 912 F. 2d 1542.

No. 89–7539. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 750.

No. 90–293. WHEREHOUSE ENTERTAINMENT, INC., ET AL. *v.* MCMAHAN & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 576.

No. 90–341. ROSENBERG ET AL. *v.* CITY OF LORAIN, OHIO. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 65 Ohio App. 3d 408, 584 N. E. 2d 744.

No. 90–513. MUSACCHIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 493.

No. 90–526. SHORT *v.* BELLEVILLE SHOE MANUFACTURING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 1385.

No. 90–625. HOY ET AL. *v.* REED. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 324.

No. 90–1122. GOLOCHOWICZ *v.* GRAYSON, WARDEN, CHARLES EGELER CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 712.

No. 90–1247. CITY OF SPOKANE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 84.

No. 90–1281. GLEICHER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 1514.

No. 90–1456. LEVIN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 570 So. 2d 917.

No. 90–1457. LITTLES *v.* AREA HEALTH DEVELOPMENT BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 744.

No. 90–1486. LONG ET AL. *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 570 So. 2d 257.

No. 90–1502. PRATHER *v.* DAYTON POWER & LIGHT CO. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 1255.

No. 90–1555. MAYNARD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1581.

No. 90–1594. LUNDBLAD *v.* CELESTE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 627.

No. 90–1595. MAKAH INDIAN TRIBE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 576.

No. 90–1607. MANATT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 8th Cir. Certiorari denied. Reported below: 922 F. 2d 486.

No. 90–1613. LAKEVIEW DEVELOPMENT CORP. *v.* CITY OF SOUTH LAKE TAHOE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1290.

No. 90–1619. PINEHURST AREA REALTY, INC. *v.* VILLAGE OF PINEHURST. Ct. App. N. C. Certiorari denied. Reported below: 100 N. C. App. 77, 394 S. E. 2d 251.

No. 90–1683. HARTNESS ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 61, 919 F. 2d 170.

No. 90–1694. LINGERFELT *v.* COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1058.

No. 90–1699. CHI-SEN LI *v.* RUIZ, JUDGE, MUNICIPAL COURT OF EAST LOS ANGELES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 2d 844.

No. 90–1700. WRENN *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–1701. BIRD, TRUSTEE OF THE FRANK L. BIRD PROFIT SHARING TRUST, ET AL. *v.* SHEARSON LEHMAN/AMERICAN EXPRESS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 926 F. 2d 116.

No. 90–1705. MIRZOEFF *v.* NAMDAR. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 161 App. Div. 2d 348, 555 N. Y. S. 2d 101.

No. 90–1708. MUSSLEWHITE *v.* STATE BAR OF TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 786 S. W. 2d 437.

No. 90–1714. REGIONAL AIRLINE PILOT ASSN. ET AL. *v.* WINGS WEST AIRLINES, INC., DBA AMERICAN EAGLE. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1399.

No. 90–1717. TAYLOR *v.* CARR, UNITED STATES MAGISTRATE FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 90–1719. MATTIA *v.* EMPIRE BLUE CROSS & BLUE SHIELD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–1720. GROSSMONT UNION HIGH SCHOOL DISTRICT *v.* DAVIES. C. A. 9th Cir. Certiorari denied. Reported below: 930 F. 2d 1390.

No. 90–1723. BROWN ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 141 Ill. 2d 180, 565 N. E. 2d 1319.

No. 90–1726. KUNTZ *v.* SHAWMUT BANK OF BOSTON ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 163 App. Div. 2d 697, 559 N. Y. S. 2d 825.

No. 90–1729. MATUSKA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 203 Ill. App. 3d 1103, 597 N. E. 2d 304.

No. 90–1735. LEVINSON *v.* BUDD FOODS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 928 F. 2d 410.

No. 90–1737. FULTON COUNTY, GEORGIA *v.* S. J. GROVES & SONS CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 752.

No. 90–1739. FUQUA INDUSTRIES, INC., ET AL. *v.* JANDRUCKO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 576 So. 2d 1320.

No. 90–1750. GUARDSMARK, INC. *v.* PINKERTON'S, INC. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–1754. DEEDS *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 1460.

No. 90–1758. BEST BUY WAREHOUSE *v.* BEST BUY CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 536.

No. 90–1785. TA-CHUN WANG *v.* CHUN WONG ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 163 App. Div. 2d 300, 557 N. Y. S. 2d 434.

No. 90–1810. HICKEY *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 23 Conn. App. 712, 584 A. 2d 473.

No. 90–1813. DUTRIDGE ET AL. *v.* CITY OF TOLEDO, DIVISION OF BUILDING INSPECTION. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 90–1820. SPEAR *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1470.

No. 90–1823. WATSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–1847. CAMOSCIO *v.* HODDER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 930 F. 2d 906.

No. 90–1867. CLAY *v.* EXCHANGE MUTUAL INSURANCE CO. Ct. App. Tenn. Certiorari denied.

No. 90–5181. WHITNEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 560 So. 2d 170.

No. 90–5426. SAWYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 1217.

No. 90–6221. BEDONIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 913 F. 2d 782.

No. 90–6337. FLOWERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 707.

No. 90–6488. CROSSON *v.* OHIO. Ct. App. Ohio, Delaware County. Certiorari denied.

No. 90–6539. GOODWIN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 185.

No. 90–6607. PITTS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 109.

No. 90–7097. PAITSEL *v.* BLACK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7109. HERNANDEZ *v.* WOOTEN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7131. CASTLE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1304.

No. 90–7204. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 921 F. 2d 78.

No. 90–7264. DECANZIO *v.* QUINLAN, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 594.

No. 90–7304. MILLER *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 136.

No. 90–7365. MURPHY *v.* MESCHER. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 859.

No. 90–7393. WICKHAM *v.* BOWERSOX, SUPERINTENDENT, OZARK CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1111.

No. 90–7397. GRAYER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–7408. BOUT *v.* KENT COUNTY ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–7485. ADEFUYE *v.* CARLSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 860.

No. 90–7662. BUMGARNER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 510.

No. 90–7664. D'AGNILLO *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 17.

No. 90–7696. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 850.

No. 90–7838. CHICANO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 216 Conn. 699, 584 A. 2d 425.

No. 90–7869. HATCH *v.* UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 859.

No. 90–7912. HITE, INDIVIDUALLY AND AS TRUSTEE FOR HITE, AKA HEYDT *v.* BOARD OF ADJUSTMENTS-ZONING FOR THE

CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7931. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 930 F. 2d 30.

No. 90–7932. STEPHENS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7939. REED *v.* FT. WORTH INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 601.

No. 90–7951. MUTH *v.* CARROLL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 418.

No. 90–7954. BAXTER *v.* CLARK, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 927 F. 2d 607.

No. 90–7956. PARKER *v.* AMERICAN NATIONAL RED CROSS. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–7957. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–7958. SAVAGE *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1459.

No. 90–7959. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–7960. ZATKO *v.* MARSHALL. C. A. 9th Cir. Certiorari denied.

No. 90–7962. VENERI *v.* FULCOMER, DEPUTY COMMISSIONER, WESTERN REGION, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7964. LABOY *v.* KELLY ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7968. RICKETTS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–7969. WOLFENBARGER *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. C. A. 10th Cir. Certiorari denied.

No. 90–7974. KOH *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 145.

No. 90–7978. OWENS *v.* JACOBS, CHAIRMAN, PENNSYLVANIA BOARD OF PROBATION AND PAROLE. C. A. 3d Cir. Certiorari denied. Reported below: 931 F. 2d 51.

No. 90–7984. WIGHTMAN *v.* MORALES, ATTORNEY GENERAL OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 90–7985. TWYMAN *v.* GIDDENS. Sup. Ct. Ala. Certiorari denied. Reported below: 579 So. 2d 1307.

No. 90–7990. ANDERSON *v.* LEHR ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–8013. EDGEMON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 924 F. 2d 126.

No. 90–8015. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–8024. JOST *v.* OREGON ET AL. (two cases). C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 862.

No. 90–8029. PORTER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 925 F. 2d 1107.

No. 90–8030. JOHNSON *v.* LONGVIEW INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 737.

No. 90–8043. HUMPHREY *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1464.

No. 90–8045. GRAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 931 F. 2d 890.

No. 90–8047. COOK *v.* BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL. Ct. App. Tenn. Certiorari denied.

No. 90–8048. FUHRMAN *v.* CITY OF DAYTON. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 90–8056. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 931 F. 2d 52.

No. 90–8062. ANDERSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 57 Ohio St. 3d 168, 566 N. E. 2d 1224.

No. 90–8088. FOSTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–8097. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 597.

No. 90–8099. COLEMAN *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 188.

No. 90–8105. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 601.

No. 90–8131. WINSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1472.

No. 90–8132. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1458.

No. 90–8137. BOZEMAN *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 931 F. 2d 903.

No. 90–8140. FIGUEROA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 611.

No. 90–8142. BORROTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–8148. WHITTEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–8151. WILSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 590 A. 2d 1002.

No. 90–8155. TERLECKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 860.

No. 90–8156. TERPAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1472.

No. 90–8159. PRICE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 930 F. 2d 35.

No. 90–8162. BANDALI *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 835.

No. 90–8167. LITTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 927 F. 2d 604.

No. 90–8168. MICOLTA-BRAVO, AKA LOZANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–8172. JARRETT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 597 and 598.

No. 90–8182. OWENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 597.

No. 90–8191. MALBROUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 922 F. 2d 458.

No. 90–8194. IZQUIERDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–8198. GRAHAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 930 F. 2d 910.

No. 90–8200. CARDONA-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 928 F. 2d 402.

No. 90–8208. AVILA-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 611.

No. 90–8211. DE LA CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 928 F. 2d 1137.

No. 90–8212. SUTTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–8221. HUNTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 187.

No. 90–8225. NUNEZ *v.* COSTELLO, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 932 F. 2d 955.

No. 90–8227. LAURELEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 926 F. 2d 649.

No. 90–8230. SYDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 930 F. 2d 916.

No. 90–8231. SMITH, AKA HOUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 188.

No. 90–8233. BONILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 420.

No. 89–7679. RUSSELL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir.;
No. 90–5512. HALIBURTON *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–5726. KILLS ON TOP *v.* MONTANA. Sup. Ct. Mont.;
No. 90–6029. FREEMAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–6758. LAGRAND *v.* ARIZONA. Super. Ct. Ariz., Pima County;
No. 90–6819. WOODS *v.* INDIANA. Sup. Ct. Ind.;
No. 90–6939. PAZ *v.* IDAHO. Sup. Ct. Idaho;
No. 90–7018. LAGRAND *v.* ARIZONA. Super. Ct. Ariz., Pima County;
No. 90–7067. GRIFFIN *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–7449. FLOYD *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–7499. COLEMAN *v.* INDIANA. Sup. Ct. Ind.;
No. 90–7557. DEBLANC *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7560. HAMMOND *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7570. GOODWIN *v.* TEXAS, Ct. Crim. App. Tex.;
No. 90–7756. ATKINS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 90–7830. MILLER *v.* GEORGIA. Sup. Ct. Ga.;
No. 90–7871. NEWSTED *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 90–7905. POWELL *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–7916. TENNARD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7973. LEWIS *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–8023. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 90–8093. JAMES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 89–7679, 892 F. 2d 1205;

No. 90–5512, 561 So. 2d 248; No. 90–5726, 243 Mont. 56, 793 P. 2d 1273; No. 90–6029, 563 So. 2d 73; No. 90–6819, 557 N. E. 2d 1325; No. 90–6939, 118 Idaho 542, 798 P. 2d 1; No. 90–7067, 794 S. W. 2d 659; No. 90–7449, 569 So. 2d 1225; No. 90–7499, 558 N. E. 2d 1059; No. 90–7557, 799 S. W. 2d 701; No. 90–7560, 799 S. W. 2d 741; No. 90–7570, 799 S. W. 2d 719; No. 90–7756, 303 S. C. 214, 399 S. E. 2d 760; No. 90–7830, 259 Ga. 296, 380 S. E. 2d 690; No. 90–7905, 798 S. W. 2d 709; No. 90–7916, 802 S. W. 2d 678; No. 90–7973, 572 So. 2d 908; No. 90–8023, 803 S. W. 2d 272; No. 90–8093, 805 S. W. 2d 415.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–817. MICHIGAN *v.* NASH. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 90–1370. ROLFS, SUPERINTENDENT, TWIN RIVERS CORRECTIONS CENTER *v.* RUSSELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 893 F. 2d 1033.

No. 90–1730. SNOW, CHAIRMAN, GEORGIA STATE BOARD OF PARDONS AND PAROLES *v.* AKINS ET AL. C. A. 11th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 922 F. 2d 1558.

No. 90–891. WHITE ET AL. *v.* DANIEL ET AL. C. A. 4th Cir. Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 909 F. 2d 99.

No. 90–1458. WILLIAMS COS., INC., ET AL. *v.* DIRECTOR OF REVENUE OF MISSOURI. Sup. Ct. Mo. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 799 S. W. 2d 602.

No. 90–1461. CARTER ET AL. *v.* SOUTH CENTRAL BELL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no

part in the consideration or decision of this petition. Reported below: 912 F. 2d 832.

No. 90–1697. CADA *v.* BAXTER HEALTHCARE CORP. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 920 F. 2d 446.

No. 90–1503. ORDWAY ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 908 F. 2d 890.

No. 90–1743. NATIONAL ADVERTISING CO. *v.* VILLAGE OF DOWNERS GROVE, ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 204 Ill. App. 3d 499, 561 N. E. 2d 1300.

No. 90–1671. HULL *v.* SHUCK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 926 F. 2d 505.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

One of the questions presented in this case is whether the "intracorporate conspiracy" rule, which holds that employees of a single entity cannot conspire with each other, applies to claims brought under 42 U. S. C. § 1985(3). We expressly left open that issue in *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 372, n. 11 (1979).

Here, petitioner alleged that several school district officials engaged in a racially motivated conspiracy to deprive her of her constitutional rights, in violation of § 1985(3). In affirming the District Court's grant of summary judgment in favor of the officials, the Court of Appeals applied the intracorporate conspiracy rule, reasoning that "[s]ince all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy." 926 F. 2d 505, 510 (1991).

As respondents admit, see Brief in Opposition 6, the decision below conflicts with the decisions of at least two other Courts of Appeals. See *Stathos* v. *Bowden*, 728 F. 2d 15, 20–21 (CA1 1984); *Novotny* v. *Great American Fed. Sav. & Loan Assn.*, 584 F. 2d 1235, 1259, and n. 125 (CA3 1978) (en banc), vacated on other

grounds, 442 U. S. 366 (1979). I would grant certiorari on question 1 presented in the petition to resolve the conflict.

No. 90–1749. TRAILER MARINE TRANSPORT CORP. *v.* ZAPATA GULF MARINE CORP. C. A. 5th Cir. Motion of petitioner to strike respondent's supplemental brief denied. Certiorari denied. Reported below: 925 F. 2d 812.

No. 90–7928. FELTROP *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 803 S. W. 2d 1.

JUSTICE MARSHALL, dissenting.

In *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), this Court held that, once a defendant is sentenced to death by an erroneously instructed jury, a reviewing court can resentence the defendant to death only if it *clearly and expressly* engages in either harmless-error analysis or reweighing of permissible aggravating and mitigating circumstances. See *id.*, at 741, 752, 754. It is conceded that the petitioner in this case was sentenced to death by an erroneously instructed jury. Nonetheless, the Missouri Supreme Court concluded that the trial court's *summary* denial of petitioner's motion to set aside the jury sentence constituted a constitutionally adequate resentencing. Because *Clemons* does not permit us to infer from the trial court's silence that it engaged in the requisite reweighing or harmless-error analysis, I would grant the petition for certiorari.

I

Petitioner was convicted of capital murder. At the conclusion of the penalty phase of his trial, the jury determined that the murder "'involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.'" 803 S. W. 2d 1, 14 (Mo. en banc 1991). On the basis of this single aggravating factor, the jury sentenced petitioner to death. *Id.*, at 6. Petitioner thereafter filed a motion to reduce his sentence, arguing, *inter alia*, that the "depravity of mind" aggravating factor was unconstitutionally vague under this Court's precedents. The trial court denied the motion, stating from the bench that it "'has listened attentively to [petitioner's argument] and has recalled the testimony and the evidence in this cause, and the Court will overrule the Motion for Reduction of Sentence.'" *Id.*, at 16.

The Missouri Supreme Court affirmed. The court acknowledged that the "depravity of mind" aggravating factor was uncon-

stitutionally vague under this Court's decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See 803 S. W. 2d, at 14. See generally *Shell* v. *Mississippi*, 498 U. S. 1 (1990) *(per curiam)*; *Clemons* v. *Mississippi*, 494 U. S. 738 (1990); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). It also acknowledged that the trial court had erred in not instructing the jury to apply the limiting construction fashioned by the Missouri Supreme Court in order to save the "depravity of mind" factor from unconstitutionality. See 803 S. W. 2d, at 14, citing *State* v. *Preston*, 673 S. W. 2d 1, 11 (Mo. en banc), cert. denied, 469 U. S. 893 (1984).* Nonetheless, relying on *Walton* v. *Arizona*, 497 U. S. 639 (1990), the Missouri Supreme Court concluded that the trial court's summary denial of petitioner's postsentence motion sufficed to cure any error in the jury's sentencing verdict. In *Walton*, this Court held that, where the death sentence is imposed by a trial judge, the trial judge need not expressly state that he has relied upon a constitutionally necessary limiting construction, because "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Id.*, at 653. The Missouri Supreme Court in this case reasoned that it could likewise "presum[e] that the trial judge knew and applied the relevant factors enunciated in *State v. Preston* when he evaluated and ruled on [petitioner's] motion for reduction of sentence." 803 S. W. 2d, at 16.

In my view, the Missouri Supreme Court's reliance on *Walton* was clearly misplaced. As used in *Walton*, the "presumption" that a trial court has followed the law stands only for the proposition that error cannot be inferred where a trial court, acting as the initial sentencer, fails expressly to articulate its reliance on a limiting construction of what would otherwise be an unconstitutional aggravating factor. However, this presumption is clearly rebutted when, as here, the trial court *erroneously* instructs a sentencing jury by omitting any reference to the necessary limiting construction. Under such circumstances, the question is no longer

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*Under the Missouri Supreme Court's narrowing construction of the "depravity of mind" aggravating circumstance, the sentencer is to consider the following factors: "mental state of defendant; infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime." *State* v. *Preston*, 673 S. W. 2d 1, 11 (Mo. en banc), cert. denied, 469 U. S. 893 (1984).

whether error can be *inferred* from what the trial court has *not* said; error is *manifest* in what the court *has* said to the jury. See *Shell* v. *Mississippi*, *supra*; *Walton* v. *Arizona*, *supra*, at 653; *Clemons* v. *Mississippi*, *supra*, at 741; *Maynard* v. *Cartwright*, *supra*, at 363–364; *Godfrey* v. *Georgia*, *supra*, at 427–429 (plurality opinion). Thus, the question at that stage is whether a reviewing court has taken the steps necessary to *correct* sentencing error. In holding that the trial court's summary denial of petitioner's postsentence motion sufficed to cure the trial court's erroneous jury instructions in this case, the Missouri Supreme Court established a "presumption" that a reviewing court perceives and corrects all errors when it resentences a defendant to death.

This presumption is completely at odds with this Court's decision in *Clemons* v. *Mississippi*, *supra*. As in this case, the trial court in *Clemons* erred by failing to instruct the jury on a necessary limiting construction of a facially vague aggravating factor. This Court held that under such circumstances a reviewing court may itself resentence the defendant to death either by engaging in harmless error analysis or by reweighing the properly defined aggravating and mitigating circumstances. See *id.*, at 744–750, 752–753. Nonetheless, because it was "unclear whether [the reviewing court] correctly employed either of these methods," this Court vacated the sentence and remanded. *Id.*, at 741; see *id.*, at 752, 754. In particular, because the reviewing court's opinion was "virtually silent" on whether fresh consideration had been given to the mitigating evidence proffered by the defendant, this Court declined to infer that the reviewing court had correctly perceived the requirements of its resentencing function. *Id.*, at 752.

Under *Clemons*, there can be no question that the trial court's summary denial of petitioner's postsentence motion does *not* constitute a constitutionally adequate resentencing. Nothing in the trial court's brief remarks from the bench even remotely suggested that it had engaged in reweighing or harmless error analysis. The record in this case is not "virtually silent" on whether the reviewing court understood the nature of the original sentencing error; it is *completely* silent. Indeed, because the reviewing court in this case was the very court responsible for injecting the error into the sentencing process, there is every reason to believe that it was completely oblivious to the very necessity for resentencing. To apply a "presumption" that the trial court understood and applied the law under these circumstances is to turn a

defendant's right to error-free resentencing into a meaningless fiction.

The Missouri courts have failed to rectify the clear constitutional defect that has infected petitioner's death sentence. I believe that this Court is likewise remiss in its responsibilities when it permits a life-threatening error of this nature to go uncorrected.

II

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition and vacate petitioner's death sentence even if I did not view the issue in this case as being independently worthy of this Court's plenary review.

Rehearing Denied

No. 90–96. SIEGERT *v.* GILLEY, 500 U. S. 226;

No. 90–1320. CRAIG ET AL. *v.* UNITED STATES, 500 U. S. 917;

No. 90–1496. STEEG ET UX. *v.* CITY OF DEARBORN HEIGHTS, MICHIGAN, ET AL., 500 U. S. 942;

No. 90–7340. NICHOLS *v.* ILLINOIS DEPARTMENT OF PUBLIC HEALTH ET AL., 500 U. S. 908;

No. 90–7344. WILLIAMS *v.* ARIZONA, 500 U. S. 929;

No. 90–7418. DELBRIDGE ET AL. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, 500 U. S. 921;

No. 90–7447. IN RE ALSTON, 500 U. S. 941;

No. 90–7490. BRIDGES *v.* SPILLER-BRIDGES, 500 U. S. 923;

No. 90–7525. VINIK *v.* MIDDLESEX COUNTY PROBATION DEPARTMENT ET AL., 500 U. S. 935;

No. 90–7534. IN RE PREUSS, 500 U. S. 914;

No. 90–7565. MCCONE *v.* SAGEBRUSH PROPERTIES, INC., ET AL., 500 U. S. 944;

No. 90–7595. REESE *v.* HILL, WARDEN, 500 U. S. 945;

No. 90–7598. AGHA *v.* SECRETARY OF THE ARMY, 500 U. S. 925;

No. 90–7648. MORRISON *v.* LEE ET AL., 500 U. S. 956;

No. 90–7700. MARTIN *v.* UNITED STATES POSTAL SERVICE, 500 U. S. 936; and

No. 90–7734. CURIALE *v.* ALASKA, 500 U. S. 945. Petitions for rehearing denied.

No. 90–7503. SZOKE *v.* MINNESOTA MINING & MANUFACTURING CO., INC., 500 U. S. 929. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JUNE 30, 1991

Miscellaneous Order

No. A–4. HOPKINS, WARDEN, ET AL. *v.* OTEY. Application for an order to vacate the temporary stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. JUSTICE SCALIA took no part in the consideration or decision of this application.

JULY 1, 1991

Miscellaneous Order

No. A–4. HOPKINS, WARDEN, ET AL. *v.* OTEY. Motion for reconsideration of order of June 30, 1991 [*ante* this page], denied.

JULY 12, 1991

Dismissal Under Rule 46

No. 90–1165. NATIONAL LABOR RELATIONS BOARD *v.* NABORS TRAILERS, INC., NKA STEEGO TRANSPORTATION EQUIPMENT CENTERS, INC. C. A. 5th Cir. [Certiorari granted, 500 U. S. 903.] Writ of certiorari dismissed under this Court's Rule 46.

JULY 21, 1991

Certiorari Denied

No. 91–5193 (A–66). JONES *v.* WHITLEY, WARDEN. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 583 So. 2d 487.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 91–5194 (A–67). JONES *v.* WHITLEY, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application. Reported below: 938 F. 2d 536.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JULY 24, 1991

Miscellaneous Order

No. A–957 (90–1913). YELLOW FREIGHT SYSTEM, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

AUGUST 2, 1991

Dismissal Under Rule 46

No. 91–19. DAVID L. THRELKELD & CO., INC. *v.* METALLGESELLSCHAFT LTD. (LONDON) ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 923 F. 2d 245.

Miscellaneous Orders

No. A–68. SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT ET AL. *v.* NUCLEAR REGULATORY COMMISSION ET AL. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–86. SMERDON ET AL. *v.* SMERDON ET AL. Sup. Ct. N. J. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–982. IN RE DISBARMENT OF PEARSON. Disbarment entered. [For earlier order herein, see 499 U. S. 916.]

No. D–985. IN RE DISBARMENT OF ROGERS. Disbarment entered. [For earlier order herein, see 499 U. S. 934.]

No. D–988. IN RE DISBARMENT OF ANDERSON. Disbarment entered. [For earlier order herein, see 499 U. S. 945.]

No. D–991. IN RE DISBARMENT OF LELOUIS. Disbarment entered. [For earlier order herein, see 499 U. S. 957.]

No. D–992. IN RE DISBARMENT OF CROWLEY. Disbarment entered. [For earlier order herein, see 499 U. S. 957.]

No. D–998. IN RE DISBARMENT OF SUSSKIND. Disbarment entered. [For earlier order herein, see 500 U. S. 931.]

No. D–999. IN RE DISBARMENT OF COLEMAN. Disbarment entered. [For earlier order herein, see 500 U. S. 931.]

No. D–1000. IN RE DISBARMENT OF YOUMANS. Disbarment entered. [For earlier order herein, see 500 U. S. 931.]

No. D–1002. IN RE DISBARMENT OF BRAZIL. Disbarment entered. [For earlier order herein, see 500 U. S. 950.]

No. D–1003. IN RE DISBARMENT OF CAMPBELL. Disbarment entered. [For earlier order herein, see 500 U. S. 950.]

No. D–1015. IN RE DISBARMENT OF BURKE. Disbarment entered. [For earlier order herein, see *ante*, p. 1228.]

No. D–1022. IN RE DISBARMENT OF GELMAN. It is ordered that Stanley Bernard Gelman, of Jacksonville, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1023. IN RE DISBARMENT OF MATNEY. It is ordered that Harold V. Matney, Jr., of Gardner, Kan., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1024. IN RE DISBARMENT OF MOORCONES. It is ordered that John Joseph Moorcones, of Sterling, Va., be suspended

from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1025. IN RE DISBARMENT OF BOXER. It is ordered that Harry Boxer, of Lomita, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1026. IN RE DISBARMENT OF GALLAGHER. It is ordered that Dennis William Gallagher, of New Rochelle, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1027. IN RE DISBARMENT OF SAGEN. It is ordered that Burt H. Sagen, of Parma, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1028. IN RE DISBARMENT OF WEBER. It is ordered that John Anthony Weber, Jr., of Westwood, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 90–256. CHAMBERS *v.* NASCO, INC., *ante*, p. 32;

No. 90–1272. BULLARD *v.* MADIGAN, SECRETARY OF AGRICULTURE, 500 U. S. 916;

No. 90–1534. HOLLINGSWORTH *v.* TEXAS ET AL., 500 U. S. 942;

No. 90–1605. YOUNG *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 1206;

No. 90–5193. MU'MIN *v.* VIRGINIA, 500 U. S. 415;

No. 90–6633. HOPE *v.* ILLINOIS, *ante*, p. 1202;

No. 90–7259. SANDERS *v.* CALIFORNIA, 500 U. S. 948;

No. 90–7284. CHAMBERS *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA, 500 U. S. 944;

No. 90–7435. SPENCER *v.* GEORGIA, 500 U. S. 960;

No. 90–7469. GASKINS *v.* MCKELLAR, WARDEN, ET AL., 500 U. S. 961;

No. 90–7539. HORTON *v.* UNITED STATES, *ante*, p. 1234;
No. 90–7558. THOMAS *v.* NEBRASKA, 500 U. S. 944;
No. 90–7609. BUSCH *v.* JEFFES ET AL., 500 U. S. 936;
No. 90–7612. FARRELL *v.* O'BANNON ET AL., 500 U. S. 955;
No. 90–7697. WATSON *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, *ante*, p. 1208;
No. 90–7726. HENDRICKS *v.* DEPARTMENT OF THE TREASURY, *ante*, p. 1234;
No. 90–7741. POWELL *v.* ROBERTS ET AL., *ante*, p. 1208;
No. 90–7745. WHITT *v.* CALIFORNIA, *ante*, p. 1213;
No. 90–7754. DEMPSEY *v.* WHITE, *ante*, p. 1208;
No. 90–7770. FRANK *v.* CALIFORNIA, *ante*, p. 1213;
No. 90–7783. AUSTIN ET UX. *v.* WASHINGTON ET AL., 500 U. S. 957;
No. 90–7786. CASTOR *v.* CLARK, WARDEN, ET AL., 500 U. S. 960;
No. 90–7813. JONES *v.* EASTMAN KODAK CO., *ante*, p. 1220;
No. 90–7886. SHOWS *v.* NCNB NATIONAL BANK OF NORTH CAROLINA ET AL., *ante*, p. 1236;
No. 90–7956. PARKER *v.* AMERICAN NATIONAL RED CROSS, *ante*, p. 1255;
No. 90–7979. MOSCONY *v.* UNITED STATES, *ante*, p. 1211; and
No. 90–8068. SMITH *v.* UNITED STATES, *ante*, p. 1237. Petitions for rehearing denied.

No. 90–1119. LEBLANC *v.* UNITED STATES, 499 U. S. 921; and
No. 90–7825. WINDLE *v.* MARYLAND, 500 U. S. 946. Motions for leave to file petitions for rehearing denied.

No. 90–5744. CHAPMAN ET AL. *v.* UNITED STATES, 500 U. S. 453. Petition for rehearing denied. Petition of Stanley J. Marshall for rehearing denied.*

AUGUST 20, 1991

Miscellaneous Order

No. A–116. WATKINS ET AL. *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL. D. C. S. D. Miss. Application for injunction and

*[REPORTER'S NOTE: Stanley J. Marshall was an appellant in the case below. See *United States* v. *Marshall*, 908 F. 2d 1312 (CA7 1990). Marshall's petition for certiorari was denied in *Marshall* v. *United States*, No. 90–929, *ante*, p. 1205.]

stay pending appeal, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the application.

AUGUST 22, 1991

Miscellaneous Orders

No. A–140. BYRD *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. A–143. PETERSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution.

SEPTEMBER 5, 1991

Certiorari Denied

No. 91–5685 (A–174). GASKINS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. 91–5688 (A–176). GASKINS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 943 F. 2d 49.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 10, 1991

Miscellaneous Order

No. A–165. UNITED STATES DEPARTMENT OF COMMERCE *v.* ASSEMBLY OF THE STATE OF CALIFORNIA ET AL. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order of the United States District Court for the Eastern District of California, case No. Civ. S–91–0990–WBS, filed August 20, 1991, be and the same is hereby stayed pending final disposition of the appeal of that order by the United States Court of Appeals for the Ninth Circuit. JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would deny the application.

SEPTEMBER 13, 1991

Miscellaneous Orders

No. A–83. CLARKE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of mandate, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–85. RICE ET AL. *v.* UNITED STATES. D. C. Ariz. Application for stay of mandate, injunction, and restraining order, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. D–989. IN RE DISBARMENT OF MACH. Disbarment entered. [For earlier order herein, see 499 U. S. 945.]

No. D–994. IN RE DISBARMENT OF CROSLEY. Disbarment entered. [For earlier order herein, see 499 U. S. 957.]

No. D–995. IN RE DISBARMENT OF TUCKER. Disbarment entered. [For earlier order herein, see 499 U. S. 973.]

No. D–1001. IN RE DISBARMENT OF TRACY. Disbarment entered. [For earlier order herein, see 500 U. S. 940.]

No. D–1004. IN RE DISBARMENT OF LOONEY. Disbarment entered. [For earlier order herein, see 500 U. S. 950.]

No. D–1007. IN RE DISBARMENT OF RIVERS. Disbarment entered. [For earlier order herein, see *ante*, p. 1203.]

No. D–1008. IN RE DISBARMENT OF TOBIAS. Disbarment entered. [For earlier order herein, see *ante*, p. 1203.]

No. D–1009. IN RE DISBARMENT OF FRANKLIN. Disbarment entered. [For earlier order herein, see *ante*, p. 1203.]

No. D–1011. IN RE DISBARMENT OF THOMPSON. Disbarment entered. [For earlier order herein, see *ante*, p. 1215.]

No. D–1012. IN RE DISBARMENT OF LUKAS. Disbarment entered. [For earlier order herein, see *ante*, p. 1215.]

No. D–1013. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see *ante*, p. 1215.]

No. D–1014. IN RE DISBARMENT OF BENNETT. Disbarment entered. [For earlier order herein, see *ante*, p. 1228.]

No. D–1016. IN RE DISBARMENT OF GAMER. Disbarment entered. [For earlier order herein, see *ante*, p. 1228.]

No. D–1017. IN RE DISBARMENT OF CARONNA. Disbarment entered. [For earlier order herein, see *ante*, p. 1228.]

No. D–1018. IN RE DISBARMENT OF HAYDEN. Disbarment entered. [For earlier order herein, see *ante*, p. 1228.]

No. D–1021. IN RE DISBARMENT OF DUVA. Disbarment entered. [For earlier order herein, see *ante*, p. 1248.]

No. D–1029. IN RE DISBARMENT OF KESSLER. It is ordered that Melvyn Kessler, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1030. IN RE DISBARMENT OF GULLER. It is ordered that Jeffrey M. Guller, of Gastonia, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1031. IN RE DISBARMENT OF WADE. It is ordered that E. Gene Wade, of Mesa, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1032. IN RE DISBARMENT OF BRILL. It is ordered that Marvin A. Brill, of Providence, R. I., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1033. IN RE DISBARMENT OF ROBBINS. It is ordered that Gerald Rockwood Robbins, of Arlington, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1034. IN RE DISBARMENT OF OSTROWE. It is ordered that Eugene Ostrowe, of Walled Lake, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1035. IN RE DISBARMENT OF MARCUS. It is ordered that Harold V. Marcus, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1036. IN RE DISBARMENT OF GOERLICH. It is ordered that Harold L. Goerlich, of Jericho, N. Y., be suspended from the

practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1037. IN RE DISBARMENT OF DELLORFANO. It is ordered that Fred M. Dellorfano, Jr., of Cohasset, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1038. IN RE DISBARMENT OF NOLAN. It is ordered that Frank J. Nolan, of Garden City, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 118, Orig. UNITED STATES *v.* ALASKA. Motion of Alaska for modification of briefing schedule set by order of Court on June 28, 1991 [*ante*, p. 1248], granted, and it is ordered that briefs in support of cross-motions for summary judgment may be filed within 45 days of September 6, 1991, with reply briefs, if any, to be filed within 30 days of the filing of the opening briefs. [For earlier order herein, see, *e. g.*, *ante*, p. 1248.]

No. 90–408. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; and

No. 90–577. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION *v.* COUNTY OF YAKIMA ET AL. C. A. 9th Cir. [Certiorari granted, 500 U. S. 903.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–711. PRESLEY *v.* ETOWAH COUNTY COMMISSION ET AL.; and

No. 90–712. MACK ET AL. *v.* RUSSELL COUNTY COMMISSION ET AL. D. C. M. D. Ala. [Probable jurisdiction noted, 500 U. S. 914.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–741. DEWSNUP *v.* TIMM ET AL. C. A. 10th Cir. [Certiorari granted, 498 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–913. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* MCORP FINANCIAL, INC., ET AL.; and

No. 90–914. MCORP ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 5th Cir. [Certiorari granted, 499 U. S. 904.] Motion of respondents and cross-petitioners MCorp et al. for divided argument denied.

No. 90–1126. NORMAN ET AL. *v.* REED ET AL.; and

No. 90–1435. COOK COUNTY OFFICERS ELECTORAL BOARD ET AL. *v.* REED ET AL. Sup. Ct. Ill. [Certiorari granted, 500 U. S. 931.] Motion of petitioners Cook County Officers Electoral Board et al. for divided argument granted to be divided as follows: petitioners Barbara Norman et al., 15 minutes; petitioners Cook County Officers Electoral Board et al., 15 minutes; and respondents Dorothy Reed et al., 30 minutes.

No. 90–1156. NEW ORLEANS PUBLIC SERVICE INC. *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 974.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent Alliance for Affordable Energy, Inc., for divided argument and for additional time for oral argument denied.

No. 90–1205. UNITED STATES *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 90–6588. AYERS ET AL. *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 958.] Motions of Alcorn State University National Alumni Association, Joseph Califano, Jr., et al., and Jackson State University for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for divided argument granted. Motion of petitioners Jake Ayers, Jr., et al. for divided argument and for additional time for oral argument denied.

No. 90–1390. GENERAL MOTORS CORP. ET AL. *v.* ROMEIN ET AL. Sup. Ct. Mich. [Certiorari granted, 500 U. S. 915.] Motion of the Attorney General of Michigan for divided argument denied.

No. 90–1577. UNITED STATES *v.* R. L. C. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1230.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

Rehearing Denied

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO, *ante*, p. 221;

No. 89–7662. COLEMAN *v.* THOMPSON, WARDEN, *ante*, p. 722;

No. 89–7679. RUSSELL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 1259;

No. 90–333. LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW *v.* GILBERTSON ET AL., *ante*, p. 350;

No. 90–1700. WRENN *v.* OHIO ET AL., *ante*, p. 1251;

No. 90–5551. SCHAD *v.* ARIZONA, *ante*, p. 624;

No. 90–5721. PAYNE *v.* TENNESSEE, *ante*, p. 808;

No. 90–5917. NEWMAN *v.* UNITED STATES, 498 U. S. 1070;

No. 90–6799. WAGNER *v.* SEELY ET AL., *ante*, p. 1219;

No. 90–7018. LAGRAND *v.* ARIZONA, *ante*, p. 1259;

No. 90–7200. DE LA CERDA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 500 U. S. 955;

No. 90–7304. MILLER *v.* FEDERAL BUREAU OF INVESTIGATION, *ante*, p. 1254;

No. 90–7452. MORRISON *v.* BROOKS, SUPERINTENDENT, ROBESON CORRECTIONAL CENTER, 500 U. S. 922;

No. 90–7583. ZIEGLER *v.* CHAMPION, WARDEN, ET AL., 500 U. S. 944;

No. 90–7636. MEEHAN *v.* METRO NASHVILLE POLICE DEPARTMENT ET AL., 500 U. S. 956;

No. 90–7641. NABKEY *v.* UNITED STATES, *ante*, p. 1207;

No. 90–7717. SANDERS *v.* DISTRICT OF COLUMBIA ET AL., *ante*, p. 1234;

No. 90–7927. SCHMIDT *v.* UTAH ET AL., *ante*, p. 1221; and

No. 90–7969. WOLFENBARGER *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, *ante*, p. 1256. Petitions for rehearing denied.

No. 90–1503. ORDWAY ET UX. *v.* UNITED STATES, *ante*, p. 1261. Motion of petitioners to defer consideration of petition for rehearing denied. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition.

SEPTEMBER 18, 1991

Certiorari Denied

No. 91–5845 (A–214). RUSSELL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 944 F. 2d 202.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 19, 1991

Miscellaneous Order

No. A–184. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. Application to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE BLACKMUN would grant the application.

SEPTEMBER 20, 1991

Miscellaneous Orders

No. A–76. CRISTINA *v.* DERAMUS. C. A. 3d Cir. Application for certificate of probable cause to appeal, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–119. SAUKSTELIS ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–206. REPUBLICAN PARTY OF VIRGINIA ET AL. *v.* WILDER, GOVERNOR OF VIRGINIA, ET AL. D. C. W. D. Va. Application for injunction, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–1039. IN RE DISBARMENT OF TOWNSEND. It is ordered that L. Wayne Townsend, of Richmond, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90–711. PRESLEY *v.* ETOWAH COUNTY COMMISSION ET AL.; and

No. 90–712. MACK ET AL. *v.* RUSSELL COUNTY COMMISSION ET AL. D. C. M. D. Ala. [Probable jurisdiction noted, 500 U. S. 914.] Motion of NAACP Legal Defense and Educational Fund for leave to file a brief as *amicus curiae* granted. Motion of appellee Etowah County Commission for divided argument denied. Motion of appellee Russell County Commission for divided argument denied.

No. 90–1029. EASTMAN KODAK CO. *v.* IMAGE TECHNICAL SERVICES, INC., ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1216.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–1488. SUTER ET AL. *v.* ARTIST M. ET AL. C. A. 7th Cir. [Certiorari granted, 500 U. S. 915.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–6531. HUDSON *v.* MCMILLIAN ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–1205. UNITED STATES *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 90–6588. AYERS ET AL. *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 958.] Motions of National Bar Association et al. and NAACP Legal Defense and Educational Fund et al. for leave to file briefs as *amici curiae* granted.

No. 90–1361. HOLYWELL CORP. ET AL. *v.* SMITH ET AL.; and

No. 90–1484. UNITED STATES *v.* SMITH ET AL. C. A. 11th Cir. [Certiorari granted, 500 U. S. 941.] Motion of petitioners

for divided argument denied. Motion of respondents for divided argument denied.

No. 90–1491. UNION BANK *v.* WOLAS, CHAPTER 7 TRUSTEE FOR THE ESTATE OF ZZZZ BEST CO., INC. C. A. 9th Cir. [Certiorari granted, 500 U. S. 915.] Motion of American Bankers Association for leave to file a brief as *amicus curiae* granted.

Rehearing Denied

No. 90–1479. GROVER *v.* ROCHELEAU ET AL., 500 U. S. 918;

No. 90–1703. PARNAR *v.* GREEN, NING, LILLY & JONES, *ante*, p. 1206;

No. 90–7109. HERNANDEZ *v.* WOOTEN, WARDEN, ET AL., *ante*, p. 1253;

No. 90–7210. FERNANDEZ *v.* UNITED STATES, 500 U. S. 948;

No. 90–7442. ASSA'AD-FALTAS *v.* ARMSTRONG ET AL., 500 U. S. 934;

No. 90–7755. RECTOR *v.* BRYANT, ATTORNEY GENERAL OF ARKANSAS, ET AL., *ante*, p. 1239;

No. 90–7782. PARKE *v.* UNITED STATES POSTAL SERVICE, *ante*, p. 1209;

No. 90–7811. MCGREW *v.* FLORIDA, *ante*, p. 1220;

No. 90–7824. SMITH *v.* MCKASKLE ET AL., *ante*, p. 1221;

No. 90–7835. MCGARRY *v.* INTERNAL REVENUE SERVICE ET AL., *ante*, p. 1221;

No. 90–7872. MATTHEWS, AKA BROWN *v.* JOLLY ET AL., *ante*, p. 1235;

No. 90–7939. REED *v.* FT. WORTH INDEPENDENT SCHOOL DISTRICT ET AL., *ante*, p. 1255;

No. 90–7944. PLETTEN *v.* MARSH, SECRETARY OF THE ARMY, ET AL., *ante*, p. 1221;

No. 90–7962. VENERI *v.* FULCOMER, DEPUTY COMMISSIONER, WESTERN REGION, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 1255;

No. 90–7990. ANDERSON *v.* LEHR ET AL., *ante*, p. 1256;

No. 90–8024. JOST *v.* OREGON ET AL. (two cases), *ante*, p. 1256;

No. 90–8043. HUMPHREY *v.* TATE, WARDEN, *ante*, p. 1256;

No. 90–8058. CARNEY *v.* DEPARTMENT OF VETERANS AFFAIRS, *ante*, p. 1237;

No. 90–8142. BORROTO *v.* UNITED STATES, *ante*, p. 1257; and No. 90–8225. NUNEZ *v.* COSTELLO, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY, *ante*, p. 1259. Petitions for rehearing denied.

No. 90–8030. JOHNSON *v.* LONGVIEW INDEPENDENT SCHOOL DISTRICT ET AL., *ante*, p. 1256. Motion for leave to file petition for rehearing denied.

SEPTEMBER 24, 1991

Miscellaneous Order

No. A–227. MCCLESKEY *v.* BOWERS, ATTORNEY GENERAL OF GEORGIA, ET AL. Application for stay of execution of sentence of death scheduled for September 24, 1991, to allow the filing of a petition for writ of certiorari to the Superior Court of Butts County, Georgia, and/or the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay.

JUSTICE MARSHALL, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for a writ of certiorari, and would grant the petition and vacate the death sentence in this case.

II

For the third time, this Court disregards Warren McCleskey's constitutional claims. In 1986, McCleskey, an Afro-American defendant, presented uncontroverted evidence that Georgia murder defendants with white victims were more than four times as likely to receive the death sentence as were defendants with Afro-American victims. Despite such clear and convincing evidence of irrationality in sentencing—irrationality we have consistently condemned in our Eighth Amendment jurisprudence—the Court somehow rejected McCleskey's claim and upheld the constitutionality of Georgia's death penalty. See *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). Since then, the factual record has continued to

show that the death penalty is not and cannot be administered fairly: white lives are routinely valued more than Afro-American lives.

Last Term, the Court not only discounted Warren McCleskey's constitutional claim but sharply limited the opportunity of criminal defendants, even those on death row, to obtain federal habeas review. See *McCleskey* v. *Zant*, 499 U. S. 467 (1991). In radically redefining the content of the "abuse of the writ" doctrine, the Court repudiated a long line of judicial decisions and unconscionably denied defendants such as McCleskey the judicial protections the Constitution requires. The Court, in essence, valued finality over justice.

Now, in the final hours of his life, Warren McCleskey alleges that he was denied an impartial clemency hearing because the Attorney General threatened to "wage a full scale campaign to overhaul the pardons and paroles board" if the Board granted relief. McCleskey also alleges that to counteract this assault, the Board's chairman announced, even before the hearing, that there would be "no change" in McCleskey's sentence. In refusing to grant a stay to review fully McCleskey's claims, the Court values expediency over human life.

Repeatedly denying Warren McCleskey his constitutional rights is unacceptable. Executing him is inexcusable.

SEPTEMBER 25, 1991

Certiorari Denied

No. 91–5901 (A–228). MCCLESKEY *v.* BOWERS, ATTORNEY GENERAL OF GEORGIA, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN would grant the application for stay and the petition for writ of certiorari. JUSTICE STEVENS would grant the application for stay.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case. For a further expression of my views, see *McCleskey* v. *Bowers*, *ante*, p. 1281.

OCTOBER 1, 1991

Dismissal Under Rule 46

No. 88–1403. AIR LINE PILOTS ASSN. ET AL. *v.* EASTERN AIR LINES, INC. C. A. D. C. Cir. Certiorari dismissed as to petitioner International Association of Machinists & Aerospace Workers under this Court's Rule 46. Reported below: 274 U. S. App. D. C. 202, 863 F. 2d 891.

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE KENNEDY be, and he is hereby, assigned to the Second Circuit as Circuit Justice, effective October 1, 1991, pending further order.

OCTOBER 4, 1991

Dismissal Under Rule 46

No. 90–1862. EDAP, S. A. *v.* RICHARD WOLF GMBH ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 928 F. 2d 410.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1283 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL. *v.* E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN ET AL.

ON APPLICATION FOR STAY

No. A–94. Decided August 2, 1991

An application to stay the Court of Appeals' judgments—declaring that the Texas Administrative Services Tax Act is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), enjoining the tax's enforcement, and ordering the State to issue refunds to challenging taxpayers—is granted, pending applicant state officials' timely filing, and the Court's disposition of, a petition for certiorari. There is a reasonable likelihood that certiorari will be granted. The lower court's holding that the Tax Injunction Act—which provides that federal courts may not interfere with state tax collection where a plain, speedy, and efficient remedy may be had in state court—does not apply to state taxes that violate ERISA conflicts with the position of another Court of Appeals and addresses a question explicitly reserved by this Court. There is also a substantial possibility that the judgment will be reversed. In addition, unlawful interference with state tax collection always entails a likelihood of irreparable harm to the State, and there appears to be no corresponding harm that a stay would produce.

JUSTICE SCALIA, Circuit Justice.

Texas state officials responsible for the collection of taxes and the regulation of insurance seek a stay of the judgments of the Court of Appeals for the Fifth Circuit in these two sets of consolidated cases, pending action by this Court on their intended petition for certiorari. The judgments at issue upheld decisions by the United States District Court for the Western District of Texas, which declared the Texas Administrative Services Tax Act, Tex. Ins. Code Ann., Art. 4.11A

(Vernon Supp. 1991), to be pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1988 ed. and Supp. I), enjoined its enforcement, and directed the State to issue refunds to the challenging taxpayers. *E-Systems, Inc.* v. *Pogue*, 929 F. 2d 1100 (1991).

The authority for a single Justice to issue a stay of the sort requested here is conferred by 28 U. S. C. § 2101(f). Before the predecessor to that provision was enacted in 1925, see Act of Feb. 13, 1925, 43 Stat. 940, similar action could be taken by the Court by issuing a supersedeas under the All Writs Act, 28 U. S. C. § 1651. See *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923); *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 190 (1867); *Hardeman* v. *Anderson*, 4 How. 640, 642–643 (1846). Under § 2101(f), as under the All Writs Act and the prior common law, a stay issues not of right but pursuant to sound equitable discretion; "it requires," as Chief Justice Taft said, "a clear case and a decided balance of convenience." *Magnum Import Co., supra*, at 164.

The practice of the Justices has settled upon three conditions that must be met before issuance of a § 2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (Powell, J., in chambers). In my view all three of these conditions are met here.

The Tax Injunction Act, 28 U. S. C. § 1341, provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Fifth Circuit's holding that this provision does not apply to state taxes that violate ERISA is in apparent conflict with the position taken by the Ninth Cir-

cuit. See *Ashton* v. *Cory*, 780 F. 2d 816, 821–822 (1986) (Kennedy, J.). See also *General Motors Corp.* v. *California Bd. of Equalization*, 815 F. 2d 1305, 1308 (CA9 1987) (Kennedy, J.). The question has been explicitly reserved in an opinion of this Court. *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 20, n. 21, 27, n. 31 (1983). The establishment of an ERISA exception to the Tax Injunction Act is alone a matter of some importance to the States. In addition, however, the Fifth Circuit's basis for the exception is that there can be no "plain, speedy and efficient remedy" in Texas courts because ERISA forbids their consideration of ERISA pre-emption challenges. *E-Systems, Inc.*, *supra*, at 1102. This means, apparently, that state courts cannot even grant refund relief, since we have held that refund relief alone may constitute "a plain, speedy and efficient remedy." See, *e. g.*, *California* v. *Grace Brethren Church*, 457 U. S. 393, 413–414 (1982); *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 514–515 (1981). In addition, the Fifth Circuit rejected, without explanation, applicants' objection that the Eleventh Amendment forbade the District Court to require a refund of the ERISA pre-empted taxes from Texas' State Treasury. *E-Systems, Inc.*, *supra*, at 1101–1102. This is also in apparent conflict with the views of the Ninth Circuit. See *General Motors Corp.*, *supra*, at 1309. In my view these issues are of sufficient importance that a grant of certiorari by this Court is probable.

I also think there is a substantial possibility that the judgment below will be reversed. The Fifth Circuit's construction of the Tax Injunction Act and ERISA assumes that ERISA's creation of a private cause of action to enjoin violations of ERISA, 29 U. S. C. § 1132(a)(3), and its provision that this cause of action can be brought only in federal court, § 1132(e)(1), implicitly deprive the state courts of jurisdiction to entertain claims for monetary or equitable relief that rest upon the invalidity (under the Supremacy Clause) of a state

statute that violates ERISA. That is not an inevitable implication, and perhaps not a likely one. The Fifth Circuit's position on the Eleventh Amendment presumably rests upon the proposition that ERISA has impliedly authorized suit against States for monetary (as well as injunctive) relief, thus abrogating state sovereign immunity. But ERISA makes no mention of monetary relief, and in any event our cases do not favor implicit abrogation of Eleventh Amendment immunity. See *Dellmuth* v. *Muth*, 491 U. S. 223, 230 (1989); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985).

As to the third condition, the likelihood of irreparable harm: In my view the Tax Injunction Act itself reflects a congressional judgment, with which I agree, that unlawful interference with state tax collection always entails that likelihood. It produces in all cases not merely the possibility of ultimate noncollection because of the taxpayer's exhaustion of the funds but also an interference with the State's orderly management of its fiscal affairs.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871).

See also *California* v. *Grace Brethren Church*, *supra*, at 410, and n. 23. The same may be said of the asserted Eleventh Amendment violation: Directing a priority expenditure from the state treasury "may derange the operations of government, and thereby cause serious detriment to the public."

The conditions that are necessary for issuance of a stay are not necessarily sufficient. Even when they all exist, sound

equitable discretion will deny the stay when "a decided balance of convenience," *Magnum Import Co., supra*, at 164, does not support it. It is ultimately necessary, in other words, "to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted). The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others. (This depends, of course, not only upon the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also upon the relative likelihood that the merits disposition one way or the other is correct.) Or the irreparable harm threatened to the applicant, while more likely, may be vastly less severe. The balancing seems to me quite easy in the present case, since I am aware of no irreparable harm that granting the stay would produce. The State's credit remains good, and I have been advised of no emergency need for the funds already paid under protest or for any funds that will be collected before termination of the litigation.

The application for stay of the judgments of the Fifth Circuit Court of Appeals is granted, pending applicants' timely filing, and this Court's disposition, of a petition for certiorari.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1988, 1989 AND 1990

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1988	1989	1990	1988	1989	1990	1988	1989	1990	1988	1989	1990
Number of cases on dockets	14	14	14	2,587	2,416	2,351	3,056	3,316	3,951	5,657	5,746	6,516
Number disposed of during term	2	2	3	2,203	2,051	1,986	2,625	2,879	3,423	4,830	4,932	5,412
Number remaining on dockets	12	12	11	384	365	365	431	437	528	827	814	904

	TERMS		
	1988	1989	1990
Cases argued during term	170	146	125
Number disposed of by full opinions	156	143	121
Number disposed of by per curiam opinions	12	3	4
Number set for reargument	2	0	0
Cases granted review this term	147	123	141
Cases reviewed and decided without oral argument	108	79	109
Total cases to be available for argument at outset of following term	81	57	70

JUNE 28, 1991

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